(16,267.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 161.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

McCANN & SMIZER, A COPARTNERSHIP COMPOSED OF WILLIAM C. McCANN AND MILTON B. SMIZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 THE UNITED STATES OF AMERICA:

To McCann and Smizer, a partnership composed of William C. McCann and Milton B. Smizer, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, wherein The Missouri, Kansas and Texas Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brace, chief justice of the supreme court of Missouri, this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-six.

THEO. BRACE,
Chief Justice.

1½ [Endorsed:] United States circuit court, western district of Missouri, central division. McCann and Smizer *vs.* Missouri, Kansas and Texas Railway Co. Citation. Filed March 31st, 1896. Jno. R. Green, clerk. Rec'd 4, 8. M.

UNITED STATES OF AMERICA, } *ss:*
Central Division of the Western District of Missouri, }

I hereby acknowledge due service of the within citation this 3rd day of April, A. D. 1896.

J. H. RODES,
Attorney for Defendant in Error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1895, thereof, between McCann and Smizer, a copartnership composed of William C. McCann and Milton B. Smizer, respondents, and The Missouri, Kansas and Texas Railway Company, appellant, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

the same at Washington, D. C., not exceeding thirty days from the date of the citation in this cause, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 28th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

{ Seal of the United States Circuit Court, Western District of Missouri, Central Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
THEO. BRACE,
Chief Justice.

2½ [Endorsed:] No. 6391. United States circuit court, western district of Missouri, central division. McCann and Smizer *vs.* Missouri, Kansas & Texas R'y Co. Writ of error to the supreme court of the State of Missouri. Returned and filed 31st day of March, 1896. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 16th day of April, A. D. 1896.

JNO. R. GREEN, *Clerk.*

3 In the Supreme Court of the State of Missouri In Vacation.

McCANN & SMIZER, Defendants in Error,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error.

Assignment of Errors.

Now comes the above-named defendant (plaintiff in error) and, for its assignment of errors, says that in the record and proceedings in the above-entitled case there is manifest error in this:

1. The supreme court of the State of Missouri erred in holding and deciding that sec. 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the Constitution of the United States.

2. The said sec. 944 of the Revised Statutes of the State of Missouri of 1889 is repugnant to and in conflict with the Constitution of the United States for the reason that it attempts to and, if enforced according to its terms and purposes, does regulate commerce between the different States; and the supreme court of the State of Missouri erred in holding that under the effect of said statute the plaintiff in error was liable in this case for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point upon another line of railroad in the State of Illinois.

GEO. P. B. JACKSON,
Attorney for the Plaintiff in Error,
Missouri, Kansas & Texas Railway Company.

3½ [Endorsed:] McCann & Smizer *vs.* M., K. & T. R'y Co. Assignment of errors. Filed Apr. 14, 1896. Jno. R. Green, clerk.

4 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 2nd day of July, 1892, there was filed in the office of the clerk of the supreme court of Missouri a certified copy of the judgment and order granting an appeal in the case of McCann and Smizer against George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway Company, which is in words and figures as follows, to wit:

STATE OF MISSOURI, }
County of Monroe, } *ss:*

Be it remembered that among the records and proceedings of the circuit court within and for Monroe county, Missouri, the following is of record, to wit:

April Term, April 27th, 1892.

MCCANN AND SMIZER, Plaintiffs,
against
GEO. A. EDDY and H. C. CROSS, Receivers Missouri, Kansas and Texas R'y Co., Defendants.

At this day come the parties herein, by their respective attorneys, and, this cause coming on to be heard, both parties announce ready for trial; whereupon a jury is selected to try the issues herein as follows, to wit: Joseph R. Murphy, James L. Worland, Moses Tisue, Joseph Walker, James Gentry, Abner Wilson, William Golleham, C. G. Goetz, I. N. Carman, T. B. Ragland, Chas. W. Cowman, and Walker Nesbit, twelve good and lawful citizens of Monroe county,

who, being sworn as required by law, take seats in the jury-box, and, after hearing the testimony of witnesses and the argument of counsel for each of the parties hereto and after hearing the instructions of the court, retire to their room to consider of their verdict, and, after being out a reasonable length of time, return into open court the following verdict, to wit:

"We, the jury, find for plaintiff and assess *his* damages at $654.12.

JOSEPH F. WALKER, *Foreman.*"

It is therefore ordered and adjudged by the court that plaintiffs have and recover of defendants herein the sum of six hundred and fifty-four and $\frac{12}{100}$ dollars for *his* damages and the sum of — dollars, their costs in this behalf expended, and that execution issue therefor.

Afterwards, on the same day, April 27, 1892, the following proceedings were had, to wit:

McCANN AND SMIZER, Plaintiffs,
against
GEO. A. EDDY and H. C. CROSS, Receivers M., K. & T. R'y Co., Defendants.

At this day come the parties herein, by their respective attorneys, and defendants file their motion for new trial in this cause.

Afterwards on April 28th, 1892, and during April, 1892, term of said court, the following further proceedings were had, to wit:

McCANN AND SMIZER, Plaintiff-,
against
GEO. A. EDDY and H. C. CROSS, Receivers Missouri, Kansas and Texas R'y Co., Defendants.

At this day come the parties herein, by their respective attorneys, and the motion for new trial heretofore filed by defendants in this cause is submitted to the court, and the court, having seem and heard said motion, doth overrule the same; whereupon defendants make application for an appeal in this cause to the supreme court of Missouri and file their affidavit for said appeal, and the court, having considered the same, doth grant an appeal in this cause to the supreme court of Missouri. Defendants also present their bond for appeal; which said bond is by the court approved, and leave is granted defendants to file their bill of exceptions in this cause on or before August first, 1892.

Afterwards, in vacation, after April term, 1892, of said court, the following is of record, to wit:

JUNE 21ST, 1892.

McCANN AND SMIZER, Plaintiffs,
against
6 GEO. A. EDDY and H. C. CROSS, Receivers of Missouri, Kansas and Texas R'y Co., Defendants.

At this day come the defendants herein, by their attorneys, and file their bill of exceptions in this cause; which said bill of exceptions, being duly signed and sealed, is made a part of the record in this cause.

STATE OF MISSOURI, *County of Monroe,* } *ss:*

I, Chas. A. Creigh, clerk of the circuit court within and for said county and State, hereby certify that the within and foregoing is a full, true, and complete copy of the judgment and other proceedings thereafter in the case of McCann and Smizer *vs.* Geo. A. Eddy and H. C. Cross, receivers of Missouri, Kansas and Texas R'y Co., as the same appears of record in my office.

Witness my hand as clerk and the seal of our said court hereto affixed. Done at office, in Paris, Mo., June 24th, 1892.

[SEAL.] CHAS. A. CREIGH, *Clerk.*

And afterwards, to wit, on the 4th day of February, 1893, an abstract of the record in said cause for the appellants was filed; which said abstract is in words and figures as follows, viz:

In the Supreme Court of Mo., April Term, 1893.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Appellants. } No. 6391.

Appeal from Monroe circuit court.

Abstract of the Record for Appellants.

This is an action for damages on account of delay in transportation and delivery of 99 head of fat cattle, shipped by plaintiffs from Stoutsville, Mo., to Union stock yards, Chicago, Ill., over the M., K. & T. and Wabash railways.

On April 4, 1891, the plaintiffs filed the following

7 *Petition.*

In the Circuit Court of Monroe County, Mo., April Term, 1891.

McCANN AND SMIZER, Plaintiffs,
against
GEORGE A. EDDY and H. C. CROSS, Receivers Missouri, Kansas & Texas Railway Co., Defendants.

Plaintiffs say that William C. McCann and Milton B. Smizer were on the 12th day of November, 1890, and still are partners and en-

gaged in buying and shipping live stock and selling the same upon the market and were general dealers and shippers as aforesaid and were and still are doing business in the firm name and style of McCann and Smizer.

That the Missouri, Kansas & Texas Railway Company was at and prior to said date and still is a railroad corporation organized under the laws of the State of Kansas; that at said date defendants, George A. Eddy and H. C. Cross, were and still are receivers of all the property of said Missouri, Kansas & Texas Railway Company and were at said date and still are in possession of said railroad and all the rolling stock thereof, including locomotive engines, cars, and all of said property belonging to said corporation, said Eddy and Cross having been duly appointed by the United States circuit court of the eighth judicial circuit and as such were at said date and still are the duly qualified and acting receivers of the railroad property of said corporation known as the Missouri, Kansas and Texas railroad, which said railroad runs through the county of Monroe, State of Missouri, and as such receivers were and still are engaged in running and operating said railroad and doing a general railroad business, and were engaged in the business of common carriers of passengers, freight, and live stock for hire between the village of Stoutsville, in said county of Monroe, State of Missouri, to the Union stock yards, in the city of Chicago, in the State of Illinois.

8 That on the 12th day of November, 1890, plaintiffs were the owners of ninety-nine head of choice fat steers, which they desired forthwith to ship from the village of Stoutsville, in the said Monroe county, Missouri, to said Union stock yards, in the city of Chicago, in the State of Illinois.

That prior to said last-mentioned date the plaintiffs applied to defendants' depot agent at said village of Stoutsville for six cars to be furnished them in which to transport their said cattle from said village and station of Stoutsville, as aforesaid, to the Union stock yards, in the city of Chicago, State of Illinois; that in pursuance of plaintiffs' request, on the 12th day of November, 1890, said station agent and servant of defendants did so furnish said six cars for the shipment of said cattle, and plaintiffs say that on the said 12th day of November, 1890, they delivered their said ninety-nine head of steers, being fat cattle for the Chicago market, to the defendants' said station agent at Stoutsville, as aforesaid, in ample and sufficient time to have been transported and delivered at said Union stock yards, in said city of Chicago, in the early morning of the 13th day of November, 1890, in ample time for sale upon the Chicago live-stock market on said 13th day of November, 1890; that the defendants' said station agent then and there received said ninety-nine head of fat cattle on said 12th day of November, 1890, with instructions and directions from plaintiffs that said cattle be shipped, without unreasonable delay, to the said Union stock yards, at Chicago, Illinois, to be sold on the morning market on the 13th day of November, 1890.

That after so receiving plaintiffs' ninety-nine head of cattle for the purpose aforesaid the defendant- failed, neglected, and refused

to ship, transport, and deliver the same at the Union stock yards, in the said city of Chicago, without unreasonable delay; but, on the contrary, the said ninety-nine head of fat cattle were permitted to remain on the road and in transit from said Stoutsville station to said Union stock yards, in the city of Chicago, for an unreasonable length of time and were unnecessarily delayed, so that said
9 cattle did not arrive at their said destination at the Union stock yards, in the said city of Chicago, early on the said morning of the 13th day of November, 1890, in time to be sold on the market of that day; but plaintiffs aver that after said cattle arrived at Forty-seventh street, in the said city of Chicago, near said Union stock yards and in a mile and a half thereof, although they had — negligently delayed previous thereto and had not arrived at said point without unnecessary delay, yet thereafter the defendants, acting by and through their agents, servants, and employés, negligently and carelessly caused and permitted said ninety-nine head of fat cattle, as aforesaid, to remain in the cars, standing for the full space and period of three hours at Forty-seventh street, and until it was too late for them to be delivered at said Union stock yards, as aforesaid, in time for the market and to be sold on the 13th day of November, 1890, although plaintiffs say that Milton B. Smizer, of the firm aforesaid, had disembarked from the cars in which their said cattle were being transported and had walked from thence to said Union stock yards aforesaid, where he found buyers awaiting the arrival of their said cattle, who were awaiting to purchase said cattle at the price and sum of five cents per pound, provided said cattle arrived at said Union stock yards in time for market and shipment upon said *said* 13th day of November, 1890, and plaintiffs say that if said cattle had been delivered at said Union stock yards at any reasonable time during the morning of said 13th day of November, 1890, and had been delivered thereat without any negligence or unreasonable delay or detention by said defendants plaintiffs could have sold their said cattle and delivered the same to the purchasers thereof at the price and sum of five cents per pound; yet plaintiffs say that said cattle were not in fact delivered at the Union stock yards, in said city of Chicago, as aforesaid, until the unreasonable hour of 12 o'clock m. on said 13th day of November, being at an hour too late to be sold on the market of that day, by reason of which unusual, unnecessary, and unreasonable delay and negligence and careless acts of defendants' agents, servants, and employés in failing to transport and deliver said six car-loads of fat
10 cattle as hereinbefore averred plaintiffs were unable to sell said cattle on the 13th day of November, 1890, or on the following day or days without sustaining great loss upon the sale thereof, the market having declined, after the morning sales upon the said 13th day of November, thirty-five cents per hundred pounds upon the class of cattle to which plaintiffs' ninety-nine head of cattle belonged, and there were no buyers thereafter on the market for the class of cattle owned and offered for sale by plaintiffs, and said class of cattle had declined in price aforesaid and could not be sold until the following Monday, the 17th day of November,

1890, at which time plaintiffs were compelled to sell and did sell all their said cattle at twenty-five cents per hundred pounds less than they could have been readily sold for on the market of said 13th day of November, 1890, had said cattle arrived at said Union stock yards and been delivered upon the morning of said day.

Plaintiffs say they have paid all charges and demands made of them for the transportation and delivery of said cattle.

Plaintiffs say that by reason of said cattle not being delivered and sold on the 13th day of November aforesaid plaintiffs lost twenty-five cents per hundred pounds on the total weight of said cattle, said total weight being one hundred and fifty-four thousand two hundred and ninety pounds, causing a net loss to plaintiffs of three hundred and eighty dollars upon the sale of said cattle on account of the depreciation in the price thereof as aforesaid, in which sum plaintiffs are injured and have sustained damage and loss.

Plaintiffs further say that on account of being required to hold said cattle, and being unable to sell the same upon the market without great loss until Monday, the 17th day of November, 1890, as aforesaid, they were compelled to pay and did pay a feed bill and required to keep and maintain them at the costs and expense of seventy-four dollars and twelve cents, in which said further sum plaintiffs have sustained damage and loss.

Plaintiffs further say that on account of a shrinkage, shortage, and loss in weight upon said cattle, caused by keeping said
11 cattle in the Chicago Union stock yards awaiting a purchaser therefor, which said necessity for keeping said cattle awaiting a purchaser was occasioned and caused by the unusual and unnecessary delay in the transportation and delivery thereof, as hereinbefore averred, they have been further injured and damaged in the sum of two hundred dollars. Wherefore plaintiffs say they have been damaged and injured and sustained loss on account of defendants' unreasonable delays and negligent acts, as herein more fully set out, and on account of defendants' negligent failures and unreasonable delays in transporting and delivering said cattle in the Union stock yards, in the city of Chicago, in the State of Illinois, after so receiving the same as averred, plaintiffs have been damaged in the total sum of six hundred and fifty-four dollars and twelve cents, for which sum plaintiff- asks judgment and for costs of this suit.

McCANN & SMIZER,
By their att'ys, RODES & RODES.

Summons was duly served on the defendants, who appeared and filed the following

Answer.

Now come the above-named defendants and, for answer to the plaintiffs' petition herein, admit that the plaintiffs are and were partners as alleged, and that the defendants are receivers of the Missouri, Kansas and Texas railway and are operating the same as alleged.

Defendants admit that plaintiffs did on November 12th, 1890, deliver to the agent of defendants at Stoutsville ninety-five head of cattle for shipment over the Missouri, Kansas and Texas railway from Stoutsville to Hannibal, thence over the Wabash railway to the Union stock yards, at Chicago, Illinois.

Further answering, the defendants deny each and every other allegation in plaintiffs' petition contained.

Further answering, defendants state that the plaintiffs and defendants entered into a special contract for the shipment of the aforesaid cattle, in and by which contract it was agreed and stipulated, among other thing, as follows:

12 "First. That he (meaning the plaintiffs) hereby releases the party of the first part (meaning the defendants) from the liability of a common carrier in the transportation of said stock and agrees that such liability shall be only that of a mere forwarder, or private carrier for hire, and also hereby agrees to waive and release, and does hereby release said first party from any and all liability for or on account of any delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after being tendered to its agent."

"Fourth. That he, the said second party, (meaning the plaintiffs) for the consideration aforesaid, hereby assumes and releases said first party (meaning the defendants) from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock, caused by any mob, strike, threatened or actual violence to person or property, from any source, failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any of said stock, overloading cars, freight of animals, or crowding one upon another, or any and all other causes except the negligence of said first party; said negligence not to be assumed but proved by said party of the second part."

And said contract also contained, among others, the following stipulation and agreement, which is stated in said contract in words and figures following, viz:

"Thirteenth. And it is further stipulated and agreed between the parties hereto that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond

13 the line of the Missouri, Kansas and Texas railway, excepting to protect the through rate of freight named herein."

Defendants state that the line of the Missouri, Kansas and Texas railway terminate- at Hannibal, in the State of Missouri, and that said railway does not extend beyond said city of Hannibal in the direction of Chicago, Illinois, and that it was necessary that said cattle shipped by plaintiffs should be forwarded from Hannibal, Mo., over some other railroad in order to reach the Union stock yards, at Chicago, Illinois.

That said cattle were transported over the said Missouri, Kansas and Texas railway from Stoutsville to Hannibal with great promptness and expedition and without any delay on the line of said railway or in its yards; that at Hannibal, Missouri, said cattle were delivered and turned over by defendants as forwarders, under the terms and conditions of said contract, to the Wabash Railroad Company for transportation by it over its railway from Hannibal to the Union stock yards, at Chicago, Illinois.

That whether or not there was any delay in the transportation of said cattle over said Wabash railway these defendants have no knowledge or information thereof sufficient to form a belief, but if there was any such delay on said Wabash railway the defendants are not responsible therefor, and under the said contract for the shipment of said cattle these defendants are not liable for damages, if any, resulting from such delay, if any, on said Wabash railway.

Wherefore, having fully answered, defendants pray to go hence without day, and that they recover their costs in this behalf expended.

JACKSON & MONTGOMERY,
Attorneys for Defendants.

And thereupon the plaintiff- filed the following reply:

Plaintiff-, for reply to defendants' answer filed in this cause, de-
nies that plaintiff- executed said alleged contract set up in
14 defendants' answer, and *defendant* further says that said al-
leged contract, if any, was wholly without consideration and void and contrary to public policy.

The case was tried at the April term, 1892, and a verdict was rendered for plaintiffs, on which the court entered the following

Judgment.

At this day comes the parties herein, by their respective attorneys, and, this cause coming on to be heard, both parties announce ready for trial; whereupon a jury is selected to try the issues herein as follows, to wit: Joseph R. Murphy, James L. Worland, Moses Tisue, Joseph Walker, James Gentry, Abner Wilson, William Golliham, C. G. Gertz, I. N. Carmem, T. B. Rayland, Chas. W. Cowmen, and Walker Nesbit, twelve good and lawful citizens of Monroe county, who, being sworn as required by law, take their seats in the jury-box, and, after hearing the testimony of witnesses and the arguments of counsel for each of the parties hereto and after hearing the instructions of the court, retire to their room to consider their verdict, and, after being out a reasonable length of time, return into open court the following verdict, to wit:

We, the jury, find for plaintiff- and assess *his* damages at $654.12.
JOSEPH F. WALKER, *Foreman.*

It is therefore ordered, considered, and adjudged by the court that plaintiffs have and recover of defendants the said sum of six hundred and fifty-four and $\frac{12}{100}$ dollars for *his* damages and the

sum of — dollars, their costs in this behalf expended, and that execution issue therefor.

Thereupon defendants filed motion for a new trial, which was overruled, and defendants filed affidavit and bond for appeal, and appeal was granted to the supreme court.

The proceedings on the trial were preserved in the following

15 *Bill of Exceptions.*

Be it remembered that, before the Hon. Thos. H. Bacon, judge, and a jury, the following proceedings were had:

Plaintiffs' Statement.

By Mr. RHODES: The shipment, gentlemen, referred to was on the 12th of November, 1890, from Stoutsville, Missouri, to Union stock yards, Chicago, consigned to Brown Bros. & Smith, commission merchants. Mr. Smizer, one of the plaintiffs, accompanied these cattle in transit. The commission merchant, Mr. Brown, of the firm of Brown Bros. & Smith, knew the cattle. They were a special grade of fat cattle, sold only, perhaps, to special buyers, who had special orders for that class of cattle, perhaps shipped to New York or elsewhere. As a precautionary measure, Mr. Smizer informed his consignee of the date of shipment, and who had made arrangements, as is customary between the dealer and the consignee, to have buyers in readiness for a large shipment *for* special cattle, and these cattle were expected to be sold to a special purchaser there, and if they had arrived as they were expected to arrive, on the morning of the 13th of November, they could have been sold. The purchaser, whose name I disremember, had an order from New York for this class of cattle. They had been described to him by Mr. Brown, of this firm, and he waited for them as long as he could to fill his orders. You understand that he had certain orders to fill that day, and, waiting until about noon, he purchased other cattle, as plaintiffs' cattle didn't arrive in the morning—didn't get there until 12 m. He purchased and filled his order with other cattle, inferior cattle, perhaps, but cattle that he was compelled to buy in order to fill his contract with his principals; so on account of that this buyer needed no other cattle and plaintiff had no demand for his cattle at all; couldn't sell them at 25c. below what the cattle of this grade were selling for on the morning of that day. He was compelled, as stated in the petition, to hold his cattle over from this day (which was Thursday), Friday, Saturday, Sunday, until

16 Monday, when he sold them at 25c. below the market price on the day of the 13th, when they ought to have arrived, and their ground for damages is the expense to which the plaintiff was put in keeping his cattle from the time of arrival until Monday and the shortage and loss in weights. You, gentlemen, perhaps understand that better than I do.

To maintain the issues in their behalf plaintiffs called as a witness M. B. SMIZER, who, being duly sworn, testified as follows:

Direct examination by Mr. RHODES:

Q. You are one of the plaintiffs in this suit, are you?
A. Yes, sir.

It is admitted in the pleadings that this is a partnership, McCann & Smizer.

Q. Now, Mr. Smizer, state to the jury if you shipped the cattle mentioned in the petition at or about the time mentioned, November, 1890, and state to the jury what you did with reference to the shipment and any delays that occurred and the whole detailed statement of the case.
A. Well, we shipped the cattle just as we usually do.

Defendants' counsel objects to any oral statement of the terms of shipment, as there is a written contract.
By the COURT: You may inquire of the witness if there was a written contract.

By Mr. JACKSON, counsel for defendants:

Q. Was there a written contract, Mr. Smitzer, under which these cattle were shipped?
A. No special contract.
Q. Was there a written contract signed by you and the agent of the receivers? Whose signature is that placed to that paper (handing witness bill of lading, purporting to be contract referred to)?
A. It is mine, sir.
Q. Whose signature is that?
A. I don't know, sir; I take it that it is the agent's.
Q. Mr. Gauen was the agent at that time?
17 A. I don't know who was the agent. I didn't know him.
Q. That is the paper you signed at the time of this shipment, isn't it? Look at it and see if you are not satisfied that you signed the paper.

(Defendants' counsel here exhibits and hands to the witness a document for identification. Plaintiffs' counsel is permitted to examine the document also.)
The validity of this contract is not questioned in the pleadings.
By Mr. JACKSON: I asked the witness if that wasn't the contract signed by him and the agent at the time of the shipment, and he said it was; therefore I renew my objection to any statement of the terms of the shipment, etc., as they're covered by the written contract.
Objection by the court sustained.
To which ruling of the court the plaintiffs then and there at the time excepted.

By Mr. RHODES:

Q. State when you delivered these cattle to the company.

A. Early on the morning of the 12th.

Q. State whether or not you had previously applied to the company's agent for cars to ship them in.

A. We had applied to them the day before for cars.

Q. State what you said to him with reference to the shipment prior to this time.

Defendants' counsel objects to any evidence in regard to a previous application, their being no complaint that cars were not furnished, which would be a separate cause of action.

Objection by the court sustained, there being no such complaint understood in the pleadings.

To which ruling of the court in sustaining the objection plaintiff then and there at the time excepted.

By Mr. RHODES: We wish to show that it is simply a matter of inducement that they were informed of this shipment, where the stock was to be shipped, and of the necessity of getting it there
18 on time. That was prior to the written contract and doesn't form any of the matter contained in the contract, the object of the shipment, and when the cattle were desired to be landed in Chicago. They undertake to ship without unreasonable delay.

By the COURT: I should feel inclined to admit any representations as to the urgency.

By Mr. JACKSON: I have no objection to that. All that I want is that they don't seek to claim anything against us on a ground that they have set up and of which they have given us no notice.

By the COURT: The witness is cautioned not to undertake to make any complaint of the want of adequate cars. No such petition is in the case and no such complaint is made.

By Mr. RHODES:

Q. State when you applied to the agent, Mr. Smizer, for the cars.

A. Mr. McCamm ordered the cars.

Q. He is your partner?

A. Yes, sir.

Defendants' counsel objects to anything that is not of witness' own knowledge.

Objection by the court sustained.

To which ruling of the court in sustaining the objection plaintiff then and there at the time excepted.

Q. Did you accompany these cattle?

A. I did.

Q. What time did you deliver the cattle to the road there in the village of Stoutsville on the morning of the 12th?

A. Well, I don't know, Mr. Rhodes. I didn't keep any date as to the exact time, but it was early in the morning; I suppose six or seven o'clock; not later than seven o'clock. It was before breakfast.

Q. What were the character of these cattle, Mr. Smizer, with reference to weight and condition?

A. They were an extra drove of cattle; extra quality for this country.

19 Q. What was about the weight of the cattle?

A. They weighed 1,655 after the drift was off of them.

Q. At Chicago?

A. No; here at home; after the percentage of shrinkage was taken off.

Q. What was the percentage of shrinkage taken off?

A. 2 per cent.

Q. That is deducted here, is it?

A. Yes, sir; at this end.

Q. Now, what time did you get loaded?

A. I don't know exactly what time he got loaded, but there were several of us loading. I think we were loaded before ten o'clock—the whole train. There were some other parties shipping at the same time, and we helped each other. I don't know which loaded first. I didn't keep no special dates with reference to the time. I don't know what time it was.

Q. Did you inform the agent of the time you expected these cattle to be on the market?

A. No, sir; we never say anything to the agent about that at all.

Q. Did you know what a reasonable time was?

A. Yes, sir; I knew.

Q. Have you been in the habit of shipping over the road?

A. Yes, sir.

Q. What would be a reasonable time for a shipment to arrive at Chicago, starting at the time you did? What time did the train leave Stoutsville after that?

A. I don t know. I didn't keep any time. It was some time before noon, though.

Q. What would have been a reasonable time?

A. The time they left there they should have been in Chicago the next morning at seven o'clock, anyway. It would have been seven o'clock.

Q. You say you signed this paper?

A. I did.

20 Q. At whose request?

A. The agent's.

Q. Do you know whether one or two were signed?

A. Two. This is marked duplicate.

Q. There was another paper given to you, was there?

A. Yes, sir.

Q. What became of the other paper?

A. I delivered it to them to get my pass back home.

Q. Were you always required to sign a paper of this kind when making a shipment?

A. Only when I accompanied the stock or when an agent accompanied them.

Objected to by defendant- as incompetent and immaterial.

Objection by the court overruled, as witness has already answered the question.

To which ruling of the court defendant- then and there at the time excepted.

Q. Now, in this contract there is a clause as follows: "Brown Bros. and Smith." I will get you to read this part of it if you can.

Document previously mentioned is here handed back to witness and he is requested to read it if he can, a specified part of it, that following the words "head of cattle." Witness announces his inability to decipher the part which proves to be "more or less, owner's risk."

Q. This contract says ninety-five head of cattle. How many did you ship?

A. Ninety-nine.

Q. Here is a clause here, "subject to minimum weights applying to cars of various lengths as per tariff rules in effect on date of shipment, same being a special rate lower than the regular rates." I will ask you if they gave you any special rates.

A. No, sir; no rate lower than the regular rate and the same rate as every one else.

Q. Did you get the same rate given you now under this shipment as you get under a shipment where you signed no papers?

21 A. The same rate.

Q. Whether you signed that contract or whether you did not, the same rate applies?

A. Yes, sir.

Q. Did all parties under your knowledge get the same rate?

A. All that I knew of got a like rate.

Q. The rate said to be 17½ per cwt., was that the prevailing rate then for shipments at that time?

A. As far as I knew it was.

Q. Did they have a tariff sheet in the office?

A. Yes, sir; they had a tariff sheet there.

Q. That conformed to the sheet there?

Objected to as incompetent, irrelevant and immaterial, and because the tariff sheet will speak for itself.

Objection by the court sustained.

To which ruling of the court in sustaining the objection plaintiff- then and there at the time excepted and still excepts.

Q. Mr. Smizer, you may state at what time you did arrive in Chicago with this shipment of stock.

A. It was just twelve o'clock when we got in the yards. The twelve-o'clock whistle was blowing as we went into the yards in Chicago.

Q. State whether or not you found any sale for the cattle, or a purchaser or buyer awaiting you.

A. Mr. Brown had told me that he had a buyer for the cattle. I

walked on into the yards ahead of the train and met the gentleman, and he came to me several times and wanted to know if they had got in.

Defendants' counsel objects to any conversation with Mr. Brown.

Q. State if, when the cattle did arrive there, you found any buyers awaiting you, and at what price.

A. We did not. We found no buyers that day at all for that class of cattle.

22 Q. Did you put the cattle on the market there for sale that day?

A. Yes, sir.

Q. Were you able to sell them?

A. We were not.

Q. What were that class of cattle selling for on the morning of the 13th?

A. They were selling for five cents and the rise.

Q. Were you offered this amount for the cattle any time during the day after they arrived?

A. We were not.

Q. What was the best you could sell them at at any offer?

A. I had no offer, as far as I know.

Q. State whether or not there was any demand for the cattle after they arrived, for this class of cattle.

A. No demand that the commission men could find for this kind of cattle. There was an order that morning for a train of heavy cattle.

Objected to by defendants unless order was received by witness. Any statement of what was told him by others objected to.

Objection by the court sustained.

To which ruling of the court plaintiff then and there at the time excepted and still excepts.

Q. State, Mr. Smizer, how long you were compelled to keep these cattle before you did find a buyer for them.

A. We kept them until the following Monday.

Q. The 17th?

A. Yes, sir.

Q. The 13th was Thursday, and you kept them until the following Monday?

A. Yes, sir.

Q. At what cost to you? I mean, first, the cost for keeping, the feed bill.

A. $74.12 feed bill.

Q. What cost with reference to reduction in the price of cattle? What did you sell the cattle for on Monday?

23 A. The cattle were sold for 4¾ or $4.75 per cwt.

By Mr. JACKSON: Did you stay there until Monday and see them sold yourself?

A. No, sir; I did not.

Defendants' counsel objects on the ground that it is incompetent for him to state what occurred when he was not present.

Objection by the court sustained.

To which ruling of the court in sustaining the objection plaintiff- then and there at the time excepted and still excepts.

Defendants' counsel then moved to strike out all he said in regard to what happened in Chicago after he left there.

Which motion the court sustained.

To which ruling of the court in sustaining the motion the plaintiff- then and there at the time excepted and still excepts.

Q. Did you receive a statement from your commission man of the sale of the cattle?

A. I did.

Q. Have you got it?

A. I have a duplicate of it.

Q. Let me see it, Mr. Smizer.

(Statement handed to counsel by witness.)

Q. How many cattle did you ship, Mr. Smizer?

A. Ninety-nine head.

Q. What was the weight of these cattle at the date of shipment? Have you a memorandum?

A. Yes, sir.

Q. State what it was.

A. 1,655 pounds; 1,688 pounds was the gross weight per head. The gross weight of the whole lot was 167,224 pounds.

Q. You are accustomed to shipping cattle. You are in that business, I believe?

A. Yes, sir.

Q. What would be the ordinary loss in the weight of cattle shipped to sell the following day?

A. Well, the ordinary shrinkage of that class of cattle,
24 fatted like these, would be 34 to 40 pounds per head—that is, after the deduction of the two per cent. for drift.

Q. Now, what was the net weight after deducting two per cent.?

A. The net weight was 163,876 pounds.

Q. That net weight is what you paid for here?

A. Yes, sir.

Q. I understand the net weight to be the gross weight with two per cent. off?

A. Yes, sir; that is right.

Q. Now, you say there ought to have been a further reasonable shortage, a shortage of 35 to 40 pounds per head?

A. Not exceeding 40 pounds for cattle fed like these.

Q. How were these cattle fed?

A. These cattle had been fed twelve months on corn.

Q. What was the shrinkage on these cattle?

A. I don't know as I can say exactly what that was; I think, though, it was 84 pounds, as well as I remember.

Q. Did you receive this paper as a statement of the sales from Chicago from Brown Brothers & Smith?

A. No, sir; that is a duplicate of the bill.
Q. From whom did you obtain it?
A. From Brown Brothers & Smith.
Q. When did you receive it?
A. I don't remember when it was.
Q. Did you make a special request for them to send you a duplicate?
A. No, sir.
Q. Was it about the time of this shipment or very recently?
A. Very recently. One day last week; I don't remember the day.

Cross-examination by Mr. JACKSON:

Q. Mr. Smizer, who loaded these cattle into the cars?
A. Myself; and there were several other parties there who helped me and I helped them.
Q. There were some gentlemen shipping cattle at the same time and you helped one another?
A. Yes, sir; we helped one another.
Q. So far as your cattle were concerned, you loaded them in the sense that you superintended it?
A. Yes, sir.
Q. How many cars were there in the train, do you remember, or how many were added at any place at that day?
A. No, sir; I don't remember.
Q. You had six cars?
A. I did.
Q. They were all to go out at the same time?
A. Yes, sir.
Q. And did go at the same time?
A. Yes, sir.
Q. How long were you engaged in loading the train?
A. I don't remember.
Q. It took you some time?
A. Yes, sir; it took some time.
Q. You didn't go out on a regular train?
A. No, sir.
Q. They sent a special train?
A. I suppose so. I don't know whether it was a special train or not; I paid no attention to that.
Q. You didn't leave on the regular schedule time?
A. No, sir.
Q. The engine went up the road and came back a ways and pulled you as a special train to Hannibal?
A. I don't know.
Q. Went up the road a little further and was then sent back after the train to take your stock out and those of the other gentlemen. Do you recollect about that?
A. Yes, sir; they did. They left the train and doubled us up there.

26 Q. With the other train?
A. Yes, sir.
Q. Did you take any other cars at Clapper?
A. They took the cars they pulled up there with a train of cotton; I think it was cotton, as well as I remember.
Q. Pull up there?
A. Pulled up from Stoutsville, and they left the cars up at Clapper and came back.
Q. Mr. Smizer, ain't you mistaken about that?
A. No, sir; I think not.
Q. Isn't it a fact that the engine went up with one single car?
A. No, sir.
Q. And left that car up there and then came back after you?
A. If they did, they got more there. I don't know what it went up with. I didn't see it go up.
Q. You think it took hold of other cars in there?
A. I know it did.
Q. Now, then, you don't remember what time you left Stoutsville?
A. No, sir; I don't.
Q. It was before noon some time?
A. I think it was, as well as I remember. I know we met a passenger train at Monroe City. I think that is where we met them; maybe it was not.
Q. Well, now, then, you went out and loaded your cattle and then you executed these contracts in duplicate, and the agent kept one copy and you took one?
A. Yes, sir.
Q. This paper which you have already identified, which I hold, is the duplicate that the agent kept?
A. I suppose it is, as far as I know.
Q. You used the other one for return transportation?
A. Yes, sir; I used the other for return transportation.
27 Q. Then you went along. After you left Stoutsville how long was it until you got to Hannibal?
A. I didn't keep any record of time at all. I never noticed any time at any place.
Q. You didn't make any stop or lose any time on the way between Stoutsville and Hannibal? You went right along, except to pass trains?
A. Yes, sir; we went right along.
Q. You met a passenger train at Monroe City, you think?
A. Yes, sir.
Q. The trains were on time? They didn't pull up there for any delay or for anything of that sort?
A. I don't know. I don't remember.
Q. You went along and made the run to Hannibal in about an hour and a half?
A. I don't know what it was.
Q. You know it was a rather good run, wasn't it—into Hannibal?
A. I don't remember. I don't remember what time we got into Hannibal.

Q. You went as fast as a passenger train would go?

A. I don't know that we did. I don't remember.

Q. You don't remember any delay, however, on the way?

A. No, sir.

Q. You are sure that there wasn't any delay by lying at stations on the way?

A. We were a little late getting out of Stoutsville; a little delay on account of something at Clapper; I don't know what.

Q. Mr. Smizer, the engine was there waiting for you a long time before you got your cattle loaded, wasn't it?

A. It might have been. The other parties may have loaded first. I don't remember. We could have loaded before we did, but the agent told us not to.

Q. Who told you not to?

A. The agent told us there was a wreck there and we couldn't get out—a wreck, a car off, or something. We were a little
28 later getting out of Stoutsville than we intended.

Q. It didn't delay you any?

A. We didn't load as soon as we could have.

Q. It didn't delay you any after you started?

A. No, sir.

Q. You cars were there all ready for you, but somebody told you not to load. Is that what you said?

A. We didn't load as early as we intended to, but then we loaded. We have left later than that.

Q. Now, you got up there and you made the connection with the Wabash road in Hannibal all right, didn't you?

A. I don't know anything about the connections, the time, or anything about it. I paid no attention to that whatever.

Q. From the time you got to the outer depot?

A. From the time I left here I paid no attention to time or any other road.

Q. You didn't pay any attention to where the delay occurred?

A. No, sir.

Q. From the time you reached the outer depot in Hannibal until you were taken charge of by the Wabash Company and their caboose put on the train and you put under their control half an hour had not elapsed?

A. I don't know. I paid no attention.

Q. Have you no idea—no recollection?

A. None whatever.

Q. You cannot have any recollection, either, about how long it took you to go to Hannibal?

A. No, sir.

Q. Where did you get your dinner that day?

A. I don't know whether I had any or not.

Q. You even forgot your dinner?

A. It very often happens on those trips that I don't have a chance to eat.

Q. Didn't you eat your dinner in Hannibal?

A. No, sir; I don't think we did. I think we had our dinner fixed to take with us; we very often do.

Q. You must have expected to get into Hannibal after dinner time?

A. No, sir; we prefer taking it with us when we can.

29 Q. Have you any idea when you left Hannibal?

A. No, sir.

Q. You don't remember about that?

A. No, sir; I don't remember.

Q. You don't remember what day you left Hannibal?

A. Yes, sir; on the 12th of November.

Q. That you started with these cattle from Stoutsville?

A. I think it was.

Q. And you got to Hannibal and left on the same day?

A. Yes, sir.

Q. You went over the Wabash railway from Hannibal?

A. Yes, sir; I think so.

Q. Don't you know whether you did or not?

A. Yes, sir; we went over what is called the Wabash road.

Q. That is the way you expected to go when you left Stoutsville?

A. Yes, sir.

Q. You preferred the Wabash road at that time, didn't you?

A. I don't know that we had any preference.

Q. It is the one that you selected for that shipment?

A. Yes, sir.

Q. Since that time you have refused to ship over that road?

A. We have been shipping like we always did, over the same road, making the same shipments that we always have been making. We bill our stock out here.

Q. Do you direct them to go over the Wabash or the C., B. & Q.?

A. I don't direct them at all.

Q. Have you gone to Chicago since this shipment over the Wabash road?

A. I went over the same road.

Q. You are sure of that? Didn't you say at the time that you would not ship any more over the Wabash?

A. I don't know what I might have said.

Q. Now, then, where did you suffer the delay that made you late getting into the market?

A. Suffered it all along the line.

Q. All along the line?

A. I don't know. I never paid any attention to any time

30 whatever until we got to Chicago. We run in there at 39th street, I think. I don't know the exact street. It is where the Y is, where they change the engine, and I walked from there to the stock yards.

Q. What time did you get there?

A. I don't know. I had no time and I looked at no time. I think it was about eight o'clock when I got there.

Q. And then you remained there some time?

A. I don't know how long we remained there. I went onto the platform and stayed there until twelve o'clock.

Q. This delay was at 39th street, in Chicago, wasn't it?

A. I don't know where it was at. I left the stock there.

Q. You left there at eight o'clock?

A. As well as I remember—as well as I can place the time.

Q. Wasn't it a little earlier?

A. I don't know what time it was.

Q. But it was at least from eight until twelve o'clock that they occupied in getting from that street to the platform?

A. It might have been eight; it might not have been; it might have been after. I don't carry any timepiece. I just suppose it was. I got off there and left and walked across, which I often do.

Q. And supposed they would come on shortly behind you?

A. Yes, sir. I knew we were later than common.

Q. How much later than common?

A. I don't know how much. I know it was later than common, because they were on the road at the time they ought to have been there.

Q. Did you ride in the caboose?

A. Yes, sir.

Q. Did you sleep that night?

A. I was up most of the night.

Q. Do you remember any place that you laid that night for a while?

A. We were delayed some place. I don't know where it was.

Q. Over in Illinois, waiting for a passenger train to get out of the way?

A. I don't know what they were doing.

Q. They laid there in the yard how long?

A. I don't know, sir.

Q. Have you any idea about it?

31 A. It is pretty hard for a man to keep account of that unless he is thinking about it.

Q. You have had this suit pending pretty much all the time since then?

A. I hav-n't paid any attention to it; hav-n't given it a thought.

Q. Was that Decatur where you laid during the night?

A. I don't remember whether it was Decatur or where it was.

Q. It was at some station over there in Illinois where you laid for how long, about?

A. I have no recollection of it.

Q. Well, it was over an hour, wasn't it, that you laid there?

A. I don't know; it might have been. I very often go out to look after the stock and come back and lay down and go to sleep, and I never know when they go.

Q. Is that the first place you stopped for any length of time, the place that you cannot call the name of, when you stayed there at night for a while?

A. I don't know.

Q. Are you sure you were delayed at all, Mr. Smizer?

A. Where?
Q. Anywhere, any time?
A. We were late into Chicago, I know that.
Q. Well, now, what time had you gotten to this 47th or 39th street?
A. Six o'clock.
Q. What do you speak from, Mr. Smizer, the time-card—that is, the schedule time, the usual time there?
A. I don't know what the schedule time is. I speak from the time that I made the trips.
Q. You are just judging from the number of times you have gone in, not that this is the schedule time?
A. That is what I am judging from.
Q. How many times had you made that trip before that?
A. I don't know how many times.
Q. Had you made that trip before very often, and always got there at six o'clock?
A. Not always; just as often we did not do it.
Q. Do you know whether it was a special train, an extra train of the Wabash, or whether it was a regular train running on schedule time?
A. I don't know.
32 Q. Do you know or not that the schedule time for the arrival of the train at 47th street is after seven o'clock in the morning?
A. I don't know, sir, what it was. I don't know what time I was on.
Q. What time does the cattle market open in Chicago?
A. Usually from nine until ten o'clock. You mean this particular kind of cattle?
Q. Well, take it for this kind of cattle. You said they didn't get there in time for the market; what do you mean by that; when does it begin and end—that is, the kind of market you were talking about?
A. There are very few men there to buy that kind of cattle—that is, these exporters. That day there was only one man that I know of that had an order for them, and he had to fill his order at a certain time.
Q. You don't know what that time was?
A. I know it was before 12 o'clock, and he had promised to wait for the cattle and save a place for them.
Q. Your cattle?
A. Yes, sir.
Q. This buyer that buys them from Brown Bros. & Smith?
A. Yes, sir.
Q. That is what Brown told you?
A. Yes, sir.
Q. Now, these cattle were at 47th or 39th street about eight o'clock?
A. As well as I know the time.
Q. How far is that from the platform—that is, how far from where they had to run?

A. I don't know how far it is. I don't suppose it is over a mile or two; it is a short distance.

Q. So, if the cattle had gone in from this place, this Y, without any delay, they would have been in ample time for the market and could have been in on this order?

A. I suppose they could.

Q. It was, therefore, the delay that occurred at 47th street, the Y, in Chicago, that caused you the damage and loss that you complain of, wasn't it?

A. I suppose it was the delay all along that caused it.

33 Q. Isn't it a fact, Mr. Smizer, that if it had not been for that delay at this point in Chicago, at the Y, that the cattle would have been there in ample time to have gone on the market and on that order that you have spoken of, and that you would have suffered no inconvenience or loss or damage on account of any delay?

A. We could have gone in on time if they had put them in; they held them there and didn't do it.

Q. The failure to get from that point to the platform or the yards is what prevented them from getting in on this order that *that* you spoke of?

A. By not getting there in time is what prevented them from getting into this order.

Redirect examination by Mr. RHODES:

Q. You speak about the Wabash and other roads. You had no contract with the Wabash road?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

Objection by the court overruled.

To which ruling of the court defendants then and there at the time excepted and still excepts.

Q. You had no contract then with the Wabash road to ship your cattle?

A. Not that I know of.

Q. The only arrangement was with the M., K. & T.?

Objected to on the ground that the written contract speaks of the arrangement.

Objection by the court overruled.

To which ruling of the court defendant then and there at the time excepted and still excepts.

By the COURT: You have stated, I believe, that on previous occasions, starting at a corresponding time, you had reached Chicago in the neighborhood of six o'clock in the morning—that is, you reached 39th street. Is that correct?

A. Yes, sir.

Q. Can you tell the jury on what time on those previous occasions your stock had been delivered at the market place at the Union stock yards.

A. They very often had been delivered at the stock yards by six o'clock; but I don't remember dates. I could not call the dates.

34 Q. I asked you on former occasions or other occasions when you arrived at 39th street about six o'clock in the morning at what time your stock had arrived at its ultimate destination, the place to which you walked, as described in your petition.

A. They generally come right along as soon as they can switch out the train and get them started. Probably it does not take over an hour.

Q. I just asked you what they did on those occasions that you know of previous shipments?

A. They have gone right down just as quick as they could hitch on an engine and pull down. It is only a short distance.

By Mr. RHODES:

Q. Were these cattle shipped through in the same cars that the M., K. & T. furnished you?

A. They were.

Q. They were not unloaded *for* the time they were loaded at Stoutsville until unloaded at the Union stock yards?

A. No, sir.

Recross-examination by Mr. JACKSON:

Q. This contract that has previously been shown to you and identified by you and which was signed by you and the agent contains this language, does it not?

Form 1134.

Missouri, Kansas & Texas railway—George A. Eddy and H. C. Cross, receivers.

Rules and Regulations for the Transportation of Live Stock.

No station agent or receiver of this railway has any power or authority to bind the receivers in regard to shipment of live stock, except by written contract in the following form:

Neither has such agent any power or authority to contract to have cars at his or any other station for the shipment of live stock at any given or named date, or to agree to furnish, under any circumstances, any particular class of cars.

All kinds of live stock will be taken under the provision of and at the rates and weights provided for by the tariff classification applying to the territory in which the shipment originates.

35 In case the owner or consignor agrees to hold these receivers free from liability from any and all causes enumerated in the following contract, also agrees to load, unload, feed, water and attend to the stock himself, etc., as specified therein, the rates agreed upon and specified in the contract will be given.

The said receivers of this railway, as aforesaid, will not assume

any liability over the actual value (but in no case exceeding one hundred dollars per head on horses) of live stock except by special agreement.

For the purpose of taking care of the stock, the owner or man in charge, in proportion to the number of cars as endorsed thereon, will be passed on the train with it; and all persons thus passed are at their risk of any personal injury whatever, and will agree to sign release to that effect endorsed on the contract.

Live-stock Contract. (*No.* 10.)

Executed at Stoutsville station, Missouri, November 12th, 1890.

This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that, whereas, the receivers of the Missouri, Kansas and Texas railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate,
36 lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:

1st. That he hereby releases the party of the first part from the liability of common carrier in the transportation of said stock, and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive release, and does hereby release said first party from any and all liability for and on account of any delay in shipping said stock, after the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent.

2nd. That the second party hereby agrees to accept and does *except*, for the transportation of his said stock, cars tendered him by the said first party, and agrees that he will see that they are in good, safe condition, and that they are securely fastened so as to prevent the escape of said stock therefrom, and that he will not hold the said first party responsible for any loss or damage that may result from neglect or failure on his part or of his agent or employé to do so; he also agrees to assume, and does hereby assume all risks of injury or loss to his stock because of any defect in said cars; by their being wild, unruly, weak, or maiming each other or them-

selves, or of heat, suffocation or other results of being crowded into the cars, or being injured or destroyed by fire, or on any account whatever, especially caused by burning hay, straw and other materials used for bedding cars or bedding stock or for any purpose; and if any of the said stock shall sustain injury or damage while in transit, the presumption shall be that the same resulted from overloading or from the neglect or inattention of the party of the second part, his or their employés accompanying said stock, for which the party of the first part shall in no respect be liable.

(Written across that paragraph with pen and ink are the words, "minimum weight allowed 20,500 lbs.")

3rd. That at his own risk and expense he is to take care of, feed, water and attend to said stock while the same may be in
37· the stock yards of the said first party or elsewhere awaiting shipment, allowing the same to be loaded, transported, unloaded, reloaded, and to load, unload, reload the same at feeding or transfer points and wherever the same may be unloaded, reloaded for any purpose whatever, and hereby covenants and agrees to hold said first party harmless on account of all loss or damage to said stock while being so in his charge and so cared for and attended to be him or his agents or employés as aforesaid; and in case first party should have any reason to undertake to water or feed said stock, it shall not be liable for any insufficient supplies or imperfect discharge of any such undertaking.

4th. That the said second party for the consideration aforesaid, hereby assumes, and releases said first party from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property, from any source; failure of machinery or cars, injury to track or yards, storms, floods, escape or rob-ery of any stock, overloading cars, fright of animals, or crowding one upon another or any and all other causes except the negligence of said first party, and said negligence not to be assumed, but to be proved by the said party of the second part.

5th. That in all cases when the said first party shall furnish for the accommodation of the said second party, laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders and be deemed his employés while so engaged, and he hereby agrees to hold said first party harmless on account of this act.

6th. That, for the consideration aforesaid, said second party further expressly agrees that as a condition precedent to his right to any damages for any loss or injury to his said stock during the transportation thereof, or previous to the loading thereof for shipment, to give notice in writing of his claim therefor to some general officer of said first party or to its nearest station agent or to the agent
at the delivering station on the railroad which carries said stock
38 to destination or to the nearest station agent or general officer of such delivering road before said stock is removed from point of shipment or from the place of destination, and before such stock is mingled with other stock and within one day after the delivery of said stock at its point of destination, before same shall have

been removed, slaughtered or intermingled with other stock, to the end that such claim may be fully and fairly investigated, and the failure to fully comply with the terms of this clause shall be a complete bar to any recovery of any and all such claims. The written notice herein provided for cannot and shall not be waived by any person, except said general officer or station agent, and by him only in writing.

7th. Said second party further agrees for the consideration aforesaid, that in case of total loss of any of his said stock from any cause for which the said first party will be liable, to have for the same the actual cash value at the time and place of shipment, but in no case to exceed one hundred dollars per head, and shall be taken and deemed as a full compensation therefor, and in case of injury or partial loss, the amount of damage claimed shall not exceed the same proportion.

8th. It is further mutually agreed and herein expressly provided that no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any courts of law or equity unless said suit or action shall be commenced within forty days next after the damage shall have occurred. Should any suit or action be commenced against said party of the first part after the expiration of the aforesaid forty days, the lapse of time shall be deemed and taken as conclusive evidence against the validity of such claim, any statutes of limitations to the contrary notwithstanding.

9th. That this contract does not entitle the holder thereof or any other person to ride on any train except for the purpose of and in accordance with the rules and instructions printed on the back thereof, all of which are hereby expressly accepted and agreed to be made part of this, our contract.

10th. This contract does not entitle the holder or other
39 parties to ride in the cars of any train except the train in which his stock ride. Neither does it entitle him, the party of the second part named in this contract, so expressly stipulates, admits, and agrees, to return passage from destination to the point of shipment as provided in tariffs and rules in effect on date of shipment, unless this said contract is presented within — days from the date hereof, to the properly authorized agent of these receivers, for return pass, which pass, when obtained, shall be used by those only whose names are written herein, within twenty-four hours after the date of order issued. Nor does it entitle any person except the party of the second part and parties who accompany him in charge of said stock, for the purpose of assisting him in taking care of the same, specified in and upon this contract. It does not include women, infants or other persons unable to do any and perform the service required as expressed in this contract, to such return passage within the said — days. The object, purpose and intent of the return pass being to enable said party of the second part hereto, or his men in charge, as expressed in the contract, and no other person, to return to —— thereon at any time within — days from date hereof and nott hereafter.

11th. For the consideration aforesaid, the said party of the second part hereby further agrees that the said persons in charge of said stock under this contract, shall remain in the caboose car attached to the train while the same is in motion, and that whenever said persons shall leave the caboose car or pass from and along the cars or track they shall do so at their own risk of personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train and caboose cars from depots or platforms, or to furnish lights for the accommodation and safety of such persons.

12th. In consideration of the rates herein named, and the aforesaid covenants, the shipper hereby releases, and does waive and bar any and all cause of action for damages that has occurred to him by any written or verbal contract prior to the execution hereof.

40 13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto — that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas railway, excepting to protect the through rate of freight named herein.

14th. No person other than the owner of said stock, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract.

15th. As evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the printed rules and regulations at its head on the back thereof, and they all constitute a part hereof, fully assents to each.

(Signed) P. J. GAUEN,
Agent for Receivers of the Missouri, Kansas and Texas Railway.
McCANN & SMIZER, *Shipper-*.

(Endorsed on the back:) Form 1134. Missouri, Kansas & Texas Railway—George A. Eddy and H. C. Cross, receivers. Stoutsville, Mo., 11, 12, 1890. Live-stock contract.

We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass furnished us by the Missouri, Kansas and Texas railway, Geo. A. Eddy and H. C. Cross, receivers, and of the other covenants and agreements contained in said contract, including rules and regulations at the head thereof and thos- printed on the back thereof, all of which

41 for the consideration aforesaid are hereby accepted by us and made a part of this contract, and of the terms and conditions, of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said

stock, and while we are on out return passage, we shall be deemed employés of said receivers of the Missouri, Kansas and Texas railway, for the purposes of said contract stated, and that we do agree to assume, and do hereby assume all risks incident to such employment, and that said receivers shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employés.

(Signed) J. O. RICHART.
M. B. SMIZER.

Car numbers.	Initials.
1480	A. & P.
3	M., P. S. Co.
991	C. C. C. C.
1307	P. F. W. & C.
176	P. R. R.
4327	M., K. & T.

Pass on freight trains only.

J. O. Richart, M. B. Smizer, parties in charge accompanying stock.

(Signed) P. J. GAUEN, *Agent.*

NOTE.—Agent will make contract in duplicate, giving one to shipper and returning the other to the freight claim agent, Sedalia, Mo.

(Along the margin of that matter is the following:)

"This pass must be written in ink; otherwise it will not be valid."

Q. Isn't it a fact that this is the same contract, the one I have just read?

A. I suppose it is.

EDWARD BROWN, being duly sworn in behalf of plaintiff-, testified as follows:

42 Direct examination by Mr. RHODES:

Q. What is your full name?
A. Edwin E. Brown.
Q. Where is your place of residence?
A. Chicago, Illinois.
Q. What is your business, Mr. Brown?
A. Live-stock commission business.
Q. What is the firm name to which you belong?
A. Brown Bros. & Smith.
Q. Are you a member of that firm?
A. I am, sir.
Q. Do you know McCann & Smizer?
A. Yes, sir.
Q. I will get you to look at that paper, Mr. Brown. (Paper purporting to be statement from Brown Bros. & Smith to McCann & Smizer is here handed witness.) What is that paper?

A. That is a duplicate account sales of cattle that was made for McCann & Smizer November 17th.

Q. Have you one there with you?

A. Yes, sir.

Q. Well, what is the one you have in your hand?

A. It is the same.

Q. I will ask you if you remember making sale of any cattle for McCann & Smizer on November 17th, 1890, or thereabout.

A. I do, sir. I sold the cattle personally; worked on them from the time they came over until they were sold.

Q. Mr. Brown, do you remember what time these cattle reached Chicago?

A. Yes, sir; Thursday, the 13th, at about 12 o'clock or perhaps a few minutes later; right at 12.

Q. At what point was that where they arrived?

A. At the Union stock yards, Chicago.

Q. Did you see Mr. Smizer that day before that time?

A. Yes, sir.

—. What time did he get there?

A. He got to the stock yards about 8 o'clock.

Q. How many cattle were there in that shipment?

A. Ninety-nine.

Q. I will ask you if those cattle were sold on the day of their arrival.

A. They were not.

43 Q. Why?

—. We couldn't get a bid for them.

Q. Well, why was it that you could not get a bid for them?

A. It was too late for the market that day, at the time those cattle were received. We had but few buyers who were handling extra good, heavy cattle. Eastman's buyer, of New York, was the principal man who was buying the bulk of heavy cattle.

Q. What were these?

A. They were good, heavy cattle; a very fat drove of cattle. By the time the cattle arrived there he had filled his order and didn't buy anything more that week.

Q. If those cattle had arrived there at any time before noon, or, say, from the opening hour of the market, the ordinary, usual time, could they have been sold that day?

A. I think so; yes, sir.

Q. At what price?

A. I received information the day before the cattle arrived that they would be shipped; I knew of the cattle.

Q. Whom did you receive that information from?

A. From McCann & Smizer; that they would be there on the morning of the 13th with this string of cattle. I went to Mr. Burns, who buys for Eastman, of New York, knowing that he would most likely be the best buyer of this string of cattle, and told him what I would have the next morning. Well, he said he wanted them. The next morning I saw him several times, and every time he asked me if the cattle had arrived, and after I met Mr. Smizer I told Mr.

Burns that they were over on the Y, but would certainly be in in a very few minutes, but he waited until almost noon, twelve o'clock. I saw him between eleven and twelve, and he asked me the same question and said that he was still waiting, but was on the trade for other cattle, and if I didn't get my cattle he wanted to close the trade. As soon as the cattle arrived I hunted him up, but he had then filled his order and was out of the market for any more that day.

Q. What could they have been sold for?

A. I think they could have been sold for 5c. a pound.

Q. Now, as a matter of fact, were or were not the cattle sold?

A. They were sold the morning of the 17th.

44 Q. What was the reason, if any, for keeping those cattle over from Thursday until Monday?

A. Simply because we couldn't get a buyer for them. There was no market for them. There was no market for them on Friday. There was scarcely a demand for heavy cattle, especially a large drove; might perhaps buy one or two lots, but those who were buyers of heavy orders had no orders neither Friday nor Saturday.

Q. Now, Mr. Brown, as a matter of fact, what did those cattle sell for on Monday?

A. Ninety-eight head for $4.75 a hundred and one steer for four cents a pound.

Q. Now, what was the reason for the drop in value, if any, from Thursday until Monday?

A. Simply for lack of demand.

Q. That is, the depreciation in the market value from Thursday until Monday?

A. This particular buyer I refer to gets orders Monday morning usually to buy so many cars of cattle during the week, and if he thinks best to buy the cattle before the latter part of the week he does so, and it is often the case that he is not in the market either Friday or Saturday. That happened to be the case that particular time.

Q. State whether or not that class of cattle was lower on Monday that they were on Thursday.

A. Yes, sir.

Q. I will ask you, Mr. Brown, if you have the weights of these cattle.

A. I have, sir.

Q. Will you please give them to the jury—the weights of these cattle in Chicago when they were weighed? They were weighed when they were sold?

A. Yes, sir.

(Witness reads from memorandum: 98 head weighed 154,290; one steer weighed 1,320; total weight, 155,610.)

Q. What does it aggregate?

A. 155,610.

Q. You don't know anything about what they weighed when they were shipped?

A. No, sir.

Q. Will you tell the jury what is the ordinary or usual shrinkage of that class of cattle shipped from Stoutsville, Mo., where these cattle were, to Chicago? On the morning of their arrival there what would be the ordinary shrinkage for that class of cattle per head?

45 A. As far as my information extends, I should say the average would be some place from twenty to forty pounds. There are cases where they do not shrink anything, and again they will shrink a good deal. I have sold cattle in Chicago that would weigh as much as they did in Missouri.

Q. I will ask you as a matter of fact whether or not a shrinkage of eighty-four pounds a head for that class of cattle would be an ordinary or extraordinary shrinkage.

A. I would call it an extraordinary shrinkage.

Q. I will ask you what is the effect upon cattle as to the shrinkage held over from Thursday until Monday; whether they will shrink in weight.

A. Yes; they usually do. It is very seldom that we can get as good weights on cattle after the first day. I have tested it a number of times when we have held cattle over.

Q. I will ask you whether it is not a fact that cattle held over in that sort of way continue to shrink.

A. My experience is that cattle continue to shrink from the time they leave the feed-lot until they are slaughtered. The longer they're kept the more they shrink.

Q. Now, Mr. Brown, what was the expense, if you know, attending the keeping of those cattle over from Thursday until Monday, in the way of a feed bill?

A. The total expense was $74.12—feed, $49.12; corn, $25.

Q. Mr. Brown, suppose that the gross weight of those cattle here being 167,224 pounds—that is the gross weight—they were shrunk here two per cent., leaving a net weight of 163,876. Now, that was their net weight here after shrinking them two per cent. I will ask you, Mr. Brown, that being the case, that being the net weight of the cattle, what would have been the ordinary shrinkage of that class of cattle, reaching Chicago and sold on the market the next day after leaving here?

A. I should say ordinary shrinkage would be from thirty-five to forty pounds.

Q. Figure it at forty pounds.

A. The shrinkage would be 3,960 pounds.

46 Q. You say their weight there was 155,610 pounds?

A. Yes, sir.

Q. Now, take their net weight here, which was 163,876, and I understood you their net weight in Chicago was 155,610 pounds.

A. Yes, sir.

Q. Now, I want to know what the shrinkage was in Chicago, the actual shrinkage was.

A. The actual shrinkage was the difference between 163,876 and 155,610 pounds, or 83 pounds per head.

Q. And it ought to have been not over forty?

A. The average weight in Missouri, after the two per cent. was taken off, was 1,655 pounds, and the average net weight in Chicago was 1,572 pounds, making a difference of 83 pounds.

Q. That was the actual shrinkage, taking the weights as they're given?

A. Yes, sir.

Cross-examination by Mr. JACKSON:

Q. Mr. Brown, what was the name of the gentleman you sold the cattle to?

A. Charlie Reynolds, who buys for Hammond.

Q. You didn't sell to Mr. Burns?

A. No, sir.

Q. He is the man you were talking to?

A. Yes, sir; the man I expected to sell to Thursday.

Q. Was he the only man you tried to sell to on Thursday?

A. No, sir; I tried a number of others.

Q. Was he the only man buying that class of cattle that day?

A. He wasn't the only man buying that class of cattle, but he was paying better prices for strictly fat cattle.

Q. Was there anybody else buying strictly fat cattle?

A. Oh, yes; a number of them, but he was paying more than they were. He was willing to pay more for quality than any other buyer.

Q. How much more was he giving than the others?

A. He was buying a really better grade of cattle.

Q. How much more was be paying per pound?

A. Well, I don't really know that he paid any more per pound. Other buyers paid as much per pound that day for different grade of cattle.

47 Q. Better or worse cattle?

A. Well, there are times when a man will pay more for a drove of 1,350-pound cattle than for a drove of 1,550, because he wants that quality.

Q. Tell the jury whether or not there was anybody but that man that was buying cattle of the class to which these belong.

A. Oh, yes; there were several of them buying cattle of the same class.

Q. Were they paying as much as Burns was?

A. Well, I couldn't say that they were paying really as much, because I expected him to be my best buyer.

Q. That is the reason that you kept after him?

A. Yes, sir.

Q. What was the difference in the price he was paying and what they were paying?

A. Well, I cannot answer that question. I cannot say that they were paying any difference on strictly fat cattle, a drove of fat cattle. There were plenty of other buyers that would buy other classes of cattle.

Q. I am not talking of other classes of cattle. I asked you if there was anybody else buying the same class of cattle on that day.

A. I couldn't get any one else to bid on this class of cattle; there was but that one man.

Q. I understood you to say you had an arrangement with him to wait and look out for these cattle and he did wait, but, these cattle not getting there before twelve o'clock, he bought all he wanted from somebody else, and after that the other buyers were pretty much all filled up.

A. Yes, sir.

Q. With other classes of cattle?

A. Yes, sir.

Q. Now, then, as a matter of fact, there was but one buyer for this class of cattle, and he bought all he wanted without these; hence the market was glutted with this class of cattle that day?

A. No; there wasn't a heavy run. It was glutted after twelve o'clock.

Q. Take the whole day through.

A. The market was quite active, and a good demand in the forenoon.

Q. But there was only one buyer, and he got all he wanted to fill his order without these cattle: hence, adding these to what he bought, it made more than there was a demand for that day?

48 A. Yes, sir.

Q. Mr. Brown, you say Mr. Smizer was at the stock yards about 8 o'clock in the morning?

A. Yes, sir.

Q. The cattle got there about twelve?

A. Yes, sir.

Q. About four hours difference between them?

A. Yes, sir.

Q. You have no personal knowledge where he left the cattle?

A. No, sir.

Q. You were expecting them to come every minute?

A. Yes, sir; and watched very closely for them.

Q. And if they had come almost any time before 12 it would have served the purpose?

A. If they could have got there by 11 o'clock I could have made the sale.

Q. With reference to the Y, it is about three-quarters of a mile from the stock yards, on the main line of the Wabash, is it, what is called 47th street?

A. In the neighborhood of 47th street.

Redirect examination by R. B. BRISTOW:

Q. Mr. Brown, are you acquainted with the matter of time which it requires cattle leaving the region of Stoutsville, Mo., to reach Chicago on an ordinary run?

A. Yes, sir.

Q. I will ask you what time cattle leaving Stoutsville, say, from

any time before noon on Thursday they ought to reach the Union stock yards, in Chicago.

Objected to be defendants' counsel as incompetent, because he has not shown any qualification to speak on the subject.

Objection by the court for the present sustained.

To which ruling of the court in sustaining the objection plaintiff- then and there at the time excepted.

Q. How long have you been engaged in the commission business at the stock yards?

A. Seventeen years.

Q. During that time have you received much or little of stock shipped from this section of the country, from Monroe county?

A. We have handled a great deal of stock from all over this part of the State.

Q. Do you know—are you acquainted with the ordinary time which it takes a shipment of stock from this county to reach
49 Chicago, the length of run it requires?

A. Well, it ought to take about twenty hours.

Objected to by defendants' counsel for same reasons as before.

The answer having been made, the objection is by the court overruled.

To which ruling of the court defendant- then and there at the time excepted and still excepts.

Defendant- then moves to strike out answer, which motion is by the court sustained.

To which action of the court in sustaining the motion plaintiff- then and there at the time excepted and still excepts.

Q. Did you ever ship any stock from this country to Chicago?

A. Yes, sir.

Q. Do you know of your own knowledge of shipments by other people to Chicago?

A. Yes, sir; I tell you what I base my judgment on more than anything else. We very often have cattle at Quincy and Hannibal subject to our orders, and we telegraph them to leave there at a certain time, and, knowing what the time is, we figure on the run to Chicago. That is what I base my judgment on.

By Mr. R. B. BRISTOW: I renew the former question.

Defendants' counsel then renews the objection on the ground that the fact of his having shipped a train-load of cattle, having them held and having telegraphed for them, is no criterion as to what the average time is when running all sorts of ways.

By the COURT: There are two views to take of this: One is that the objection should arise in the way of cross-examination showing his want of information; the other is that he should not be qualified. The understanding is that he is not offered as an expert having acquaintance with these matters. It is ruled that the witness may have knowledge from the usual course of his business as testified to, making him competent to testify; therefore the objection will be overruled, and let the matter come up in cross-examination.

To which ruling of the court defendant- then and there at
50 the time excepted and still excepts.

Q. What would be the usual time for a shipment of cattle leaving Stoutsville any time before noon on Thursday to reach Chicago—the Union stock yards—on the usual run without any unnecessary delays?

A. I should say that cattle leaving Stoutsville at 12 o'clock should arrive not later than 8 o'clock.

Q. At the Union stock yards?

A. Yes, sir.

Q. I will ask you how long it should take a train of cars leaving 47th street, in Chicago, to reach the Union stock yards—leaving the region of 47th street, to reach the Union stock yards.

A. It ought not — take over five minutes.

Q. Mr. Brown, in your examination-in-chief I believe you stated that you could have sold these cattle for five cents on Thursday if they had been in time?

A. Yes, sir.

Q. I will ask you if that was the market value of those cattle on Thursday.

A. It was.

Q. Mr. Brown, I will ask you this question: The same buyer being there, why would he not take them on Monday at the same price?

Objected to by defendant- as incompetent, irrelevant, and immaterial.

Objection by the court overruled.

To which ruling of the court defendant- then and there at the time excepted.

Q. Just state it, Mr. Brown.

A. Because they were stale cattle After a drove of cattle is held over a day or two they are called stale, and buyers don't like to take them.

Q. I will ask you whether or not that had the effect to depreciate their price.

A. Yes, sir; almost invariably depreciates the price.

Defendant- admits the partnership of McCann & Smizer; also the receivership. They also admit the shipment of 95 head of cattle on November 12th, 1890. Defendant- admits the receipt of freight charges, the proper proportion of it for the M., K. & T. and the other for the Wabash. They admit the receipt of the amount due the roads specified, according to the division of charges.

51 EDWIN BROWN recalled by plaintiff-.

By R. B. BRISTOW:

Q. Have you the bill, Mr. Brown, that you had?

A. Yes, sir.

Q. I will ask you if the freight on that stock was paid.

By leave of the court the defendant- withdraws *his* admission on the subject of the payment of the freight.

Q. I will ask you, Mr. Brown, if the freight on this stock was paid.
A. Yes, sir.
Q. By whom?
A. By Brown Bros. & Smith.
Q. What amount of freight?
A. $259.88.
Q. To whom was that paid?
A. That was paid to George T. Williams, secretary and treasurer of the Union Stock Yards Transit Company.
Q. What was it paid to him?
A. The railroad company delivers the stock to the Union Stock Yards Transit Company, and they become responsible to the railroad company for those charges. We pay to the secretary and treasurer of the stock yards transit company the amount of those charges twice a week.

By Mr. JACKSON:

Q. You don't know what the stock yards company did with that, whether they ever settled with anybody or not?
A. No, sir.
Q. You didn't pay the railroad company anything?
A. No, sir.

By Mr. R. B. BRISTOW:

Q. Is that the usual method of payment of freight on shipments of stock?

Objected to by defendant- as incompetent, irrelevant, and immaterial.
Objection by the court overruled.
To which ruling of the court defendant- then and there at the time excepted.

A. Yes, sir.

Plaintiff- here rested and closed *his* case.
Whereupon defendant- offers demurrer to the evidence.
Upon demurrer to the evidence, the court having ruled that the written contract is in evidence, plaintiff- suggests to the court
52 that when that contract was being read to the witness he stated that if the contract was to be in evidence or considered as read in evidence he objected to it on the ground that it was a contract which contains illegal and void provisions against public policy and illegal and void constructions.
The court now rules that the plaintiff- may have the benefit of said objections and of the overruling thereof, and exceptions to the said overruling are by the court accordingly allowed.
And thereupon to the ruling of the court in permitting said contract in evidence plaintiff- then and there excepted at the time and

still excepts, and prays leave of the court to reopen the case so far as to permit *him* to introduce *his* evidence to support the objections specified by *him*, which leave is accordingly granted.

Defendant- does not object to the action of the court in allowing plaintiff- to reopen *his* case, but does object to the character and type of evidence which plaintiff- proposes to introduce and will raise *his* objections whenever the evidence is offered.

To further maintain the issues in *his* behalf plaintiff- recalls M. B. SMIZER, who, having been sworn, testifies as follows:

Mr. R. B. BRISTOW:

Q. I will ask you, Mr. Smizer, if the freight rate paid on this shipment of cattle from Stoutsville to Chicago—17½c. per cwt.—was the usual rates charged for such shipments from that point.

A. It was at that time.

Q. Had you made other shipments about that time?

A. Well, I don't remember whether I made any from that point or not. I think the rate from here and from there differs a little.

Q. I will ask you if there was any special or limited rate, a lower rate, or special contract agreed upon between you and the railroad company.

A. The rate never was mentioned to me at all.

Cross-examination declined.

Mr. TULLY, being called and duly sworn in behalf of plaintiff-, testified as follows:

53 Direct examination by R. B. BRISTOW:

Q. Mr. Tully, where do you live?

A. At Stoutsville.

Q. What is your business?

A. Shipping stock.

Q. How long have you been engaged in that business?

A. About four years.

Q. Engaged in the business of shipping stock from Stoutsville to Chicago?

A. Yes, sir.

Q. Were you engaged in that business in November, 1890?

A. Yes, sir.

Q. Did you ship any stock about that time?

A. Yes, sir; I shipped some the same day that Mr. Smizer and Mr. McCann did.

Q. I will ask you what was the rate per cwt. for stock shipped that time?

A. 17½c. on cattle.

Q. Was that the usual rate?

A. Yes, sir.

Q. At that time the regular rate?

A. Yes, sir.

Q. Is that the kind of contract you made that day when you shipped your cattle?
A. Yes, sir.
Q. That is the contract you always had when you got the rate?
A. Yes, sir.
Q. You didn't know the rate charged when different contracts were made?
A. No, sir.
Q. You shipped some cattle in the same train?
A. Yes, sir.

By Mr. BRISTOW:

Q. Do you know of any different rates than that at all, regular or special, than 17½c.?
A. No, sir.
Q. Did you ever ship without signing a contract?
A. Yes, sir.
Q. Did you get the same rate?
A. Yes, sir; the same rate.
Q. Whether you signed the contract or not?
A. Yes, sir; just the same thing if I go or send a man with them.
Q. You shipped them and went as a passenger, and no contract was signed?
A. No, sir.

Cross-examination by Mr. JACKSON:

Q. Where did you ship cattle without you or somebody for you signing a contract?
A. I shipped them from Stoutsville.
54 Q. Never had any bill of lading or contract or anything for them?
A. No, sir.
Q. How did they know where to send them?
A. The agent knew where to send them.
Q. Knew where to send your cattle? How did he find out?
A. I told him.
Q. You didn't have any contract at all?
A. No, sir; didn't have any contract no more than what he fixed up.
Q. Didn't you sign something or somebody for you?
A. No, sir; I told him.
Q. Did you sign when you and they went to the same place?
A. Yes, sir.
Q. Don't you ship cattle by some other people and they sign a contract for you? Did you ever ship cattle in the care of some one else; some one else shipping and some one go along with them; they signed a contract?
A. Yes, sir; so did I.
Q. Did you never ship cattle for this other party and sign your contract as shipper?

A. Of course they have to sign. The one that goes with them has to sign and the man that ships has to sign.

Q. If nobody goes with it, then does no one sign it? When no one goes with it no one signs it?

A. No, sir.

Plaintiff- again rests and closes *his* case.

Demurrer being submitted, the demurrer is overruled; said demurrer to the evidence being in words as follows:

The court declares the law to be that under the pleadings and evidence the verdict must be for the defendant.-

This being a written paper in the form of instructions, is also by the court refused, and to this action of the court in overruling said demurrer to the evidence and refusing the same as instructions in the case defendant-, by *his* counsel, then and there at the time excepted and still excepts.

To maintain the issues in *his* behalf defendant- called as a witness Mr. FLEMING, who, being duly sworn, testified as follows:

55 Direct examination by Mr. JACKSON:

Q. What is your business?

A. Freight conductor on the M., K. & T.

Q. Were you running on that road in that capacity in November, 1890?

A. Yes, sir.

Q. Do you know anything about this shipment of cattle by plaintiff-, McCann & Smizer?

A. Yes, sir; I got ten cars, stock cars, and an engine and caboose and went there on the 12th of the month to load the ten cars of stock. I suppose it is the stock in question

Q. Were you running as a regular train or as an extra?

A. I went there as an extra; went at 9.15 and left at 11.15; was there two hours.

Q. What were they doing when you got there?

A. I think they were sorting the cattle out there ready to load.

Q. What was the occasion of you remaining there from 9.15 to 11.15?

A. Waiting for them to load the stock. I don't think they were ready to load when I got there; I was waiting for them. I went there on purpose to get them.

Q. What time did you leave Stoutsville?

A. Left there at 11.15 a. m. and arrived at Hannibal at 12.45 p. m.

Q. What length of time?

A. One hour and thirty minutes.

Q. What is the distance from Stoutsville to Hannibal?

A. 34 miles.

Q. How many stops did you have to make on the way?

A. I think I stopped at Clapper and met a passenger train at Monroe—No. 1—and side-tracked for them.

Q. Well, how much time did you lose that you were not running?

A. I didn't lose any time; in fact, leaving Stoutsville at 11.15 only barely gave me time to get to Monroe for the passenger train.

Q. How does the run that you made from Stoutsville to Hannibal, starting at 11.15, reaching Hannibal at 12.45, compare with the ordinary schedule time of freight trains?

A. It was a little faster than common. We had only ten
56 cars, and, of course, could go right along.

Q. Did you take on any other cars on the way?

A. No, sir.

Q. Have you a record of that run?

A. Yes, sir.

Q. State what is the practice and custom in regard to keeping a record of the number of cars that you handle in a freight train and the time of leaving the starting point and arriving at the destination, and so on.

A. We take a copy of the initials of the cars of the different roads, numbers, and kind of cars, what they are loaded with and the destination, seals, etc., and we make out our wheel report from that, and keep the time we leave a station and the time we arrive at the destination.

Q. When do you make those?

A. Make them at the end of the trip.

Q. When do you enter the time at which you leave the *the* station?

A. When I leave there.

Q. Have you a record of the run of this train?

A. Yes, sir.

Q. What does it show?

A. It shows that I left Stoutsville, station No. 34; we always put down the number of the station, Stoutsville is 34; left there at 11.15, 11, 12, 1890; arrived at Hannibal, that is the outer depot No. 2, number of station—arrived there at 12.45 p. m. the same day.

Q. Were you conductor on that train?

A. Yes, sir.

Q. When did you make that entry in regard to the time of leaving station 34, which you say is Stoutsville?

A. Made that leaving Stoutsville.

Q. At the time you left?

A. Yes, sir.

Q. When did you make the entry of arrival at No. 2?

A. I made that on my arrival at the outer depot, 12.45.

Q. What does your record show in regard to the number of cars?

A. Ten stock cars.

Q. Do you know when you made that?

A. When they were loading the stock there at Stoutsville; I put the numbers down after they were all loaded and I went in to take up my bills.

57 Q. You made practically all of that record except the arrival at Hannibal at the time you left Stoutsville?

A. Yes, sir.

Q. Do you recollect that these cars were loaded with cattle?
A. There were two cars of hogs.
Q. Does that show there?
A. Yes, sir; eight with cattle and two with hogs.
Q. Does anybody receipt on that book for anything?
A. The car clerk at Hannibal and at Sedalia receipts for the seals—simply the condition of the seals.
Q. Are the doors sealed?
A. Yes, sir.
Q. When your train arrives at destination he sees if these seals are all right, and if they are——
A. He signs my book.
Q. What does he sign?
A. "Seals O K."
Q. Who is that signed by there?
A. By Mr. Dunn, the car clerk at the outer depot, Hannibal; he takes the number of all cars arriving there in the daytime and inspects the seals.
Q. That terminates your connection with that train, and beyond that you have no personal knowledge?
A. I knew that the Wabash train there would take them right out; they never lay over there.
Q. Was that train waiting there that day?
A. Yes, sir.
Q. You don't know when they went out?
A. No; I don't; they are always put in the train as soon as they are inspected; it takes the carman five or ten minutes to look the cars over.
Q. What do you mean by inspect?
A. To see that the trucks, breakes, and couplings are all right.
Q. So that they are safe to go on?
A. Yes, sir.
Q. Is that matter done there at Hannibal?
A. Always done at all terminal stations.

Cross-examination by Mr. RHODES:

Q. How far it the outer depot from Hannibal?
A. Two miles.
Q. What makes you remember that the Wabash train was waiting there to take the cars?
A. Because they are always waiting for it.
58 Q. I understood you to say that that was a special train?
A. I notified the yardmaster when I left Stoutsville what time I would be there and what I had for the Wabash, ten cars of stock.
Q. That wasn't the usual time for you to arrive there?
A. That was the usual time for me to get there with the extra. We have no time when we run as extra; we get there as soon as we can.
Q. Well, you didn't see anything particular to call your attention to the fact that the Wabash was there?

A. I generally see that the stock gets out.

Q. Is that your business?

A. No; not particularly my business.

Q. I understood you to say that when your stock got there in good shape you went down with it to the same place?

A. That is, my caboose on it. I generally get into my caboose and make out my report and generally see the stock taken off of the caboose and taken down to the Wabash. Our caboose is left in one end of the yard and the stock is taken to the Wabash.

Q. The Wabash depot is two miles from there?

A. No, sir; not the freight depot. It is the same as the M., K. & T. Where the trains are made up is in one end of the yard and the depot in the other.

Q. Do you know where the stock was billed to?

A. Billed to Chicago, care of the Wabash.

Q. I believe you stated that you notified the Wabash?

A. I notified the yardmaster who has charge of the Wabash trains there in the yard the same as he has of the M., K. & T.

Q. Has charge of both trains?

A. Yes, sir.

Q. Leaving the M., K. & T. yards, it is Wabash beyond there and it turns them over to the Wabash?

A. Yes, sir.

Q. Your only recollection about that matter is simply the regular course; you have no special recollection of what occurred that particular time?

A. I think I remember of them going down.

59 Q. Did you go and deliver the stock there?

A. We delivered the stock to them.

Q. Now, was there anything special to call your attention to that train-load of cars outside of any other on that day?

A. I didn't have anything in the train but ten cars of stock. When they cut them off from my caboose I saw them going down.

Q. There was nothing to call your attention to that particular day?

A. No, sir; only I saw the stock going from the caboose; going into another part of the yard.

Q. Do you recollect of it?

A. Yes, sir; they took them off right here.

Q. Didn't you say in your examination that you recollected it because it was the usual way.

A. It is not often that we come in there loaded with nothing but stock, and they don't ever switch the box cars until they get the stock off. They take the stock off first before they switch the rest of the train.

GEORGE HENWOOD, being duly sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. JACKSON:

Q. Where do you live?
A. I live at Oakwood, Mo., about two miles west of Hannibal—southwest.
Q. Is it near what they call the outer depot?
A. Yes, sir.
Q. What business are you in?
A. Yardmaster for the M., K. & T. railroad and for the Wabash at Hannibal.
Q. Joint yards there?
A. Yes, sir; and joint yardmaster.
Q. Are you the joint yardmaster?
A. Yes, sir.
Q. Do you keep a record of the movement of trains in and out of the station there?
A. Yes, sir; there is a record kept of all trains in and out of that station for both roads.
Q. Can you by referring to your record tell when a particular train and indicate it, went in and what became of it?
A. Yes, sir.

Mr. JAMES FLEMING is here recalled and questioned by Mr. Jackson:

60 Q. Mr. Fleming, when you run an extra train does it have a train number?
A. No, sir.
Q. How do you designate it?
A. Mark it "Extra."
Q. Have you any way of designating it by the engine?
A. Yes, sir; and on an extra we carry a green signal; on the regular train we carry no signal.
Q. Have you anything on your books by which we would know that train?
A. There are train numbers in the book, and where this says No. of train this is marked "Extra."
Q. Turn to that one entered that day?
A. Records of cars, train extra, doesn't give any number.
Q. You got the number of the engine that pulled you?
A. Yes, sir; 160; Lyons, engineer.
Q. Was that put down at the time you were at Stoutsville?
A. Yes, sir.
Q. In accordance with the regular custom?
A. Yes, sir.

Examination of Mr. HENWOOD resumed:

Now, Mr. Henwood, I will ask you whether or not from your record you can tell us what time extra train north with engine 160

arrived there and what it had in it and what disposition was made of the cars?

A. Yes, sir; I can.

Q. If you know it without referring to your book—have you examined to see about it?

A. I have looked over the records for that day.

Q. Turn to your record and see where it says there November 12th, 1890, extra, north, engine 160. (Witness refers to book.)

Q. While you are looking at that book you can tell us how many trains do you have there at the outer depot kept record of in a day, on an average.

A. We have, I believe, twenty-two passenger trains that pass through the yard each twenty-four hours; regular freights, between forty and fifty; and then there are extras sometimes.

By the COURT:

Q. Going which way—I suppose east?

A. Both ways. That includes all.

61 Q. This second book that you have just produced is what?

A. Train register.

Q. What do you mean by that?

A. The register that the conductor registers his arrival and the number of his train on when he comes in.

By Mr. JACKSON:

Q. The engine, engineer, number of loads and signals. When does he register that?

A. At the outer depot.

Q. Enters it upon *the* this book?

A. That is what that record is for. (Witness reads:) Here is "Extra," 12.45; Fleming, conductor; engine 160, ten loads, green signals.

Q. When was that made?

A. Mr. Fleming entered that on his arrival at Hannibal at 12.45.

Q. Just read the whole of the entry.

A. 12.45; Fleming, conductor; Lyons, engineer; 160, engine; 10 car-loads, green signals. At the head of it first in here is "Extra," in front of the hour entry that Fleming made when he arrived, "conductor in charge of the train."

Q. This book was made after the cars were checked out?

A. No; that was made when they were checked in by the yard clerk.

Q. Who made that?

A. Mr. David Dunn.

Q. Is that the gentleman who is here?

A. Yes, sir.

Q. This means, if I understand you, that there were that many cars in that train brought in by Fleming?

A. Yes, sir.

Q. And that these were the numbers of the cars and these were

the roads they came from, their initials, and that this up here is the hour of arrival, 12.45?

A. Yes, sir; November 12th, 1890.

Q. And this indicates what in regard to the way the cattle were loaded?

A. Eight cars of cattle and two cars of hogs; seals, 34; that indicates that it came from Stoutsville. Every station has a certain mark on the seal, the station number; the agent is furnished with a seal bearing that number and you can tell by the seal when it was sealed up.

62 Plaintiff and defendant agrees that the numbers in this record produced by Mr. Henwood are the same car numbers as shown by the book Mr. Fleming produced as his train book, and that the records of the cars bear the same numbers as those entries in this contract.

Q. Have you anything to show what disposition was made of these cars and how long a time elapsed before they were turned over to the Wabash?

(Witness produces third book.)

Q. What do you call that book?

A. This is a book of trains going to the Wabash road and this one to the M., K. & T. The entries are made by the same man, by Mr. Dunn.

Q. It is a book showing the trains going to the Wabash from the outer depot?

A. Yes, sir.

Q. What do you show when the train goes out?

A. We show the car number, initials, what the cars are loaded with, the seals and the number of the train they leave in, conductor and the time the train departed and date and from what road, also the seal record.

Q. Now, what is this page the record of, what day?

A. That page is the record of trains 3–4, 76; train 98, all of November 12.

Q. When you say 3–4, 76, explain to the jury what you mean.

A. 76 indicates the No., 3 to 4 indicates the sections. Sometimes we run five or six trains under the same number, but number them in sections. They have a given number for each train that leaves on regular time.

Q. They have a given number for each regular train, but sometimes run four or five trains of the same number; then, if there is more than they can carry in one train, they make up different sections of it?

A. Yes, sir.

Q. And they're called 1st, 2nd, 3rd, 4th sections according to the number they have?

A. That is the idea.

Q. This indicates the 3rd section of No. 76 and this the 4th of No. 76?

A. Yes, sir.

Q. When is this record made with reference to the departure of cars?

63 A. That record was copied from the small book that the yard clerk carries in his pocket and copies it into this, leaving this for record it the office.

Q. When the train is about to go out does he go and take the number?

A. Yes, sir; checks off the cars in the train.

Q. When does he put down the time it leaves?

A. He puts that down in the yard when the train leaves, and when he comes to the office he makes this entry in this book.

Q. Does he come in from there where the trains go out?

A. Yes, sir.

Q. You may explain how the business between the two roads is done, how the transfer is made and where, and what is to be done. For instance, taking a shipment of ten cars loaded with stock, and they are to go out on the Wabash road, what handling is there there, and how is the thing managed?

A. The yardmaster at Hannibal is notified by the transfer agent from Sedalia of the time the stock will arrive over the M., K. & T., and also notifies him of the road that the stock is going over. Say stock is reported to arrive at Hannibal at one o'clock. The yardmaster orders an engine and cars from the Wabash and notifies the Wabash people at Springfield, Ill., what he intends to do. Mr. Fleming arrived that morning at 12.45 with ten cars of cattle. I put in an order for Wabash engine to leave outer depot at 1.20. If you notice in the record, the train left at 1.15 with the stock and took just exactly the same train, the same train precisely.

Q. Left the yards at 1.15?

A. Left the yards at 1.15 and were turned over to the Wabash engine at 1.15 and passed out of the yards.

Q. After they left the yards they went out of your jurisdiction?

A. I had control of them until they left the limits of the yard, but they had been turned over to the Wabash at that time and were moving out.

Q. You acting jointly for both roads?

A. Yes, sir.

Q. You have control of the trains while in the yards?

A. Yes, sir.

Q. When they passed out of the yards then you had no

64 further control of them?

A. No, sir.

Q. They were under the control of the transfer agent of the Wabash?

A. Yes, sir.

Q. Now, then, is there any work to do on the train after it comes in there before it starts out?

A. The train is inspected by men employed for that purpose. Stock trains are usually oiled, and if they are found all right they go ahead.

Q. Then, from that record, they were only in the yard a half an hour?

A. Yes, sir; thirty minutes from the time they arrived until the Wabash had them.

Q. You may state whether or not—how long have you been yardmaster working in the yards?

A. Three years this coming October.

Q. Have you ever had experience in railroad yards before that?

A. Yes, sir; in 1873 I was employed as yardmaster in Springfield, Ill., for the Wabash road.

Q. Have you been railroading all the time since 1873 up until now?

A. Since 1873 up until 1889 in the train service as conductor on the road.

Q. Now, then, from your experience as a railroad man and running trains through the M., K. & T. yards, state whether or not that was reasonable time to consume in the handling of that train.

A. That was very reasonable. We think thirty-five or forty minutes' good work.

By the COURT:

Q. What were your hours of service as yardmaster?

A. Here I go on duty about 6.30 a. m. and remain there until 6 in the evening—sometimes 9 or 10 if I have inside work to do. If I don't get through in the daytime, I remain there at night until 8 or 9 o'clock or later if necessary.

Q. You have an assistant to take charge?

A. Yes, sir; I have an assistant—night yardmaster.

Cross-examination by Mr. J. RHODES:

Q. What did you say your employment was?

A. Yardmaster at Hannibal.

Q. By what road are you employed?

A. Employed by the M., K. & T. and placed down there.

65 Q. You are in the employ of the M., K. & T.?

A. Yes, sir.

Q. They pay you?

A. Yes, sir.

Q. Do you keep books for the Wabash?

A. Yes, sir; it is a joint station and a joint yard.

Q. I don't understand that you keep the books in person?

A. These books are kept by the yard clerk.

Q. What do you call this book?

A. It is a record for entering train records upon.

Q. This is a Wabash book?

A. Yes, sir.

Q. You keep entries in this of the time of the arrivals of trains from the Wabash?

A. Yes, sir.

Q. And in this book you keep the time of arrivals of Wabash trains at Hannibal?

A. Yes, sir.

Q. That is, coming from Chicago from the east over the line of the Wabash?

A. Yes, sir.

Q. Do you keep a record of the trains of the Wabash that run over the M., K. & T.?

A. Then they become M., K. & T., with the exception of the two Cannon Ball trains; they're Wabash trains solid, right through. Wabash engines pull them.

Q. Wabash trains running over the M., K. & T.?

A. Yes, sir.

Q. The two Cannon Ball trains are passenger trains?

A. Yes, sir.

Q. And they have freight trains, too?

A. We handle freight received from the Wabash, but handled by the M., K. & T. That freight is delivered to the Wabash at Moberly.

Q. Is there a train running through over the M., K. & T. as a Wabash train?

A. Not freight trains; no, sir; only those two passenger trains.

Q. Do you know what shipping arrangement they have between the two roads?

A. The business that is done at the station proper is done on a tonnage basis—that is, the switching and handling freight for Hannibal station proper.

Q. Let me understand you. What do you mean by that?

A. In proportion to the length of haul and the weights—the tonnage. They have a joint arrangement by which it is hauled
66 over the M., K. & T. so many miles. That is a little outside of my line. I am just speaking of the yard.

Q. I want to know what is the proportion between the two roads, the charges for transportation.

A. They have an arrangement by which they have an apportionment.

Defendant- admits that there is an arrangement by which they apportion the charges between the two roads, but does not know the proportion which each road gets.

Q. Do you know of your own knowledge?

A. No, sir.

Q. Do you know what contracts exist between the two roads with reference to shipments?

A. No, sir.

Q. But you are the agent of both roads at Hannibal?

A. Yardmaster. I have charge of all Wabash trains coming in until they leave the yard, and all M., K. & T. trains until they leave the yards.

Q. Who orders you to turn these cattle over to the Wabash?

A. I turn them over when they come there myself.

Q. By what authority, what general instructions?

A. The general way of doing business. I was simply notified that that train had ten cars of cattle for the Wabash.

Q. By the M., K. & T. at Sedalia?

A. Yes, sir.

Q. By whom did they notify you? Notified you direct?

A. Yes, sir.

Q. And then you notified the Wabash?

A. I notified the Wabash then what I would do; what time I would start the train and what they would have.

Q. Acting jointly as the agent of the two, that you were acting for the M., K. & T. yard and were agent of the M., K. & T.?

Q. That same report goes from Sedalia to Springfield, Ill., direct. Sometimes they have two or three shipments of stock in there and the Wabash dosen't know just in what shape they're going out until they see what I am going to do. When they pass through the yard they are under my control.

Q. You have control of making up the train there?

A. Yes, sir.

67 Q. Now, the cattle were not reloaded? They were billed through? In other words——

A. I think the billing was through billing. I would not say positive that it was. I believe it was.

Q. You don't rebill them?

A. No, sir.

Q. Is that the Wabash track from the outer depot into Hannibal?

A. No, sir; it is the M., K. & T. track.

Q. After they go out of the yard, over what track do they run?

A. They pass over the M., K. & T. track until they get down into the city, and then they go onto the Wabash track.

Q. And then they go onto the Wabash track at what place?

A. It is a short distance east of the Union depot at Hannibal.

Q. And they own tracks from there on to the bridge?

A. Yes, sir.

Q. You then delivered them to the Wabash on the M., K. & T. tracks?

A. Yes, sir; at the outer depot.

Q. And they are then hauled over the M., K. & T. by the Wabash until they arrive on their own tracks at some point east of the depot?

A. Yes, sir.

Q. And there, for the first time, they were on the Wabash track, and were on the Wabash tracks in Chicago?

A. Yes, sir.

Q. Clear into the city?

A. Yes, sir.

Redirect examination by Mr. JACKSON:

Q. Mr. Henwood, Mr. Rodes asked you who paid you. You draw your pay direct from the M., K. & T., do you?

A. Yes, sir.

Q. State, if you know, whether or not there is an arrangement between the two companies by which your salary, as well as other expenses of running those yards, is divided between them.

A. That is the way it is run.

Q. One company settles all the bills, and then the Wabash pays its share to the M., K. & T.?

A. Yes, sir.

Q. Otherwise the men would have to go to two places to get their pay?

A. Yes, sir.

68 Q. This place where you turned them over, is that the usual place for making up cattle trains?

A. That is the place where we make up all M., K. & T. and Wabash freight trains.

Q. Southwest of the yard?

A. Yes, sir.

By Mr. RHODES:

Q. Do you understand that the M., K. & T. has authority to make contracts over the Wabash?

A. No, sir; my understanding is that the shipper would get a contract over the Wabash at the freight depot. In this case I could not say as to whether he did or not.

DAVID DUNN, being duly sworn in behalf of the defendant-, testified as follows:

Direct examination by Mr. JACKSON:

Q. Mr. Dunn, state what position you held in November, 1890.

A. Yard clerk at the outer depot at Hannibal.

Q. What was your duty?

A. To check the number of cars in a train when they were run to the outer depot before leaving after the train is made up.

Q. Do you have any duty with reference to examining the seals?

A. Yes, sir; that is my duty; to examine the seals at the outer depot and take the number of cars.

Q. State whose writing that is on there (showing witness book).

A. That is mine.

Q. These words read, "Seals O K, D. Dunn, 11, 12, '90"?

A. Yes, sir.

Q. What does that indicate?

A. That the seals were O K. We check each train that way arriving and departing from the outer depot.

Q. Can you tell from that record what time that train arrived?

A. Yes, sir; 12.45 p. m.; three-quarters of an hour after noon.

Q. Was that the time you made this entry?

A. Yes, sir.

Q. What other duty did you have to perform with reference to these cars?

A. To take the numbers.

Q. How was that done—into what?

A. Into a small book.
Q. Is that the book?
A. Yes, sir; this is the book I have to take the numbers of each train.
69 Q. Where do you do that; out in the yard?
A. Out in the yard.
Q. When?
A. After the train arrives at the outer depot and stops there in the yard.
Q. What is it you have in regard to the arrival of the train on the 12th of November, 1890; extra, north, engine 160?
A. Yes, sir; that is the engine number, and I have the time she arrived.
Q. What time?
A. 12.45 p. m.
Q. Did you put that down at the time she arrived?
A. Yes, sir.
Q. Is that a part of your duty?
A. Yes, sir.
Q. What else do you find? How many cars do you find in the train?
A. Ten.
Q. What were they loaded with?
A. Eight with cattle and two loaded with hogs.
Q. Do you ever transfer that to any other book?
A. Yes, sir; transfer it to a large book—record that I keep in the office there.
Q. See if this is the one produced by witness Henwood.
A. Yes, sir; that is the one.
Q. Whose writing is that; is that yours?
A. Yes, sir; that is mine.
Q. Is this a copy of what you entered in the little book?
A. Yes, sir.
Q. That shows that the train run by Fleming, conductor, arrived at 12.45?
A. Yes, sir.
Q. Now, then, what duty, if any, do you perform with trains going out—going east over the Wabash?
A. Just the same as I do with those of the M., K. & T.
Q. You are the clerk in the yardmaster's office, are you?
A. Just a joint yard clerk at the outer depot.
Q. That is where the office is?
A. Yes, sir.
Q. Did you make any record of these cars that you have recorded as arriving at 12.45; any record of their departure over the
70 Wabash?
A. Yes, sir; I have a little book for that—the same book.
Q. Is it in that book?
A. Yes, sir.
Q. Have you entered it there, and did you transcribe it to another book?

A. Yes, sir; into the large book.
Q. Is this the book and is that the entry here?
A. Yes, sir; this is it here, 4–76.
Q. You transcribed from the little book about the departure of it?
A. Yes, sir.
Q. Whose writing is this?
A. It is mine.
Q. That was made up and copied from that little book?
A. Yes, sir.
Q. The little book entries were made at the time of making up the train and its departure?
A. Yes, sir.
Q. Did you know of its departure from there at the time?
A. Yes, sir.
Q. When you note the departure of a train is the engine headed in the front and the caboose on behind?
A. Yes, sir; moving out.
Q. You record the departure?
A. I record the time just as she starts to pull out of the yard.
Q. What time did this train, made up as a Wabash train, start out of those yards on that day?
A. I got the time that the train left the outer depot.
Q. What time is it?
A. I didn't record the time she was made up; she left the outer depot at 1.15 p. m. November 12th.
Q. That is, a half an hour intervened from the arrival until then?
A. Yes, sir.
Q. During that time they were making up the train, inspecting, oiling it, etc., you were out there taking down the numbers of the cars?
A. Yes, sir; and examining the seals.
Q. And this is the record of the departure of the Wabash?
A. Yes, sir; with the numbers of the cars, the initials, and what they were loaded with.
Q. How many cars went out?
A. Ten cars.
71 —. What were they loaded with? Have you entered that?
A. Eight with cattle and two with hogs, and it went out as 4–76.
Q. And you got the name of the conductor who took them?
A. Yes, sir.

It is admitted that the cars entered in the departing Wabash train are the same as referred to in the other books and in the contract.

Cross-examination by Mr. RHODES:

Q. What is your name? (I didn't understand it.)
A. David A. Dunn.
Q. What is your business?
A. Yard clerk at the Hannibal outer depot.
Q. Whom do you work under?

A. Mr. George Henwood, yardmaster at the outer depot.
Q. By whom were you employed?
A. By the M., K. & T.
Q. Who owns those yards there?
A. The M., K. & T.
Q. Owns all the track down to where the Wabash begins, some place east of the Union passenger depot?
A. Yes, sir.
Q. The Wabash then runs how far over the M., K. & T. tracks before it arrives at its own tracks—how far east from the outer depot to the Wabash track?
A. About two miles, I guess.
Q. They receive them on the line of the M., K. & T. and move them part of the way over the M., K. & T. tracks?
A. Yes, sir.
Q. You say that is a joint service out there, the Wabash and the M., K. & T., but all of them are servants of the M., K. & T., are they?
A. I believe so.
Q. All paid by the M., K. & T.?
A. Yes, sir.
Q. The tracks and yards owned by the M., K. & T. at the outer depot?
A. Yes, sir.
Q. And those cars that you examined there at Hannibal went on straight through on to the Wabash?
A. Yes, sir.
Q. And the cattle were not reloaded or rebilled?
A. I don't know anything about the billing. I don't handle the bills.
72 Q. Where were they marked to? How can you tell where they are going?
A. Going to Chicago.
Q. How did you get that information?
A. A man keeps a record in the office there.
Q. Can you tell by looking at the car where it is going?
A. No, sir.
Q. All you know is by some memorandum handed to you?
A. There is no memorandum handed to me at all.
Q. How do you know?
A. We keep a record there in the office. The car clerk keeps a record in a large book and enters each car and the contents, destination, and where they're from.
Q. So all the hands at that depot are paid by the M., K. & T.?
A. Yes, sir; I believe they are.
Q. And are in the employment of the M., K. & T.?
A. Yes, sir.
Q. The same cars go through, but the same engines do not?
A. No, sir; Wabash engines and Wabash crews.
Q. Can you tell me by looking at this book what cars these are

you have got the initials of? Tell me what cars they are; tell me the initials.

A. There's five of them M., K. & T. cars; one P. R. R.

Q. What is that?

A. Pennsylvania railroad. P., F. S. & C. and C. C. C. C., Canada cattle cars; M., S. C.; A. & P.

Q. What road is that?

A. Atlantic and Pacific.

Redirect examination by Mr. JACKSON:

Q. In regard to this payment, you perform similar duties for both roads?

A. Yes, sir; I do.

Q. Do you know whether or not it is a fact that the Wabash reimburses the M., K. & T. part of what it pays out for expenses?

A. I don't know anything about that.

Q. This little book in which you receipt these cars, what is that, whose writing is that?

A. That is my writing there. That shows the conductor who brought them in.

Q. And that shows the conductor who took them out?

A. Yes, sir.

73 Q. 1.15 p. m. is marked on there; is that marked at the time it started?

A. Yes, sir; at the time she left the outer depot.

By one of the JURY:

Q. Did you say the train left at 1.15?

A. Yes, sir; left at 1.15.

Q. Do you ever bill them out ahead of time when they are behind in order to give them a chance to make up time?

A. I don't know anything about that.

Q. Or report them ahead of time when they are behind time?

By Mr. JACKSON:

Q. These entires here, 1.15 and similar entries showing the departures of trains, I understand you to say, you do not make until the train is actually starting to move away?

A. That is when I make it, as the train moves away.

Q. Was that the usual place for transferring cattle cars from one road to the other in these yards?

A. Yes, sir.

Q. On the tracks near the outer depot?

A. Yes, sir.

Defendant here rested and closed his case.

This was all the testimony in the case.

The plaintiff- did not ask any instructions at all, and thereupon the defendant- prayed the court to give instructions numbered one, two, and three, as follows:

I.

The court instructs the jury that under the pleadings and the evidence your finding must be for the defendants.

II.

The court instructs the jury that under the contract read in evidence, under which plaintiffs' cattle were shipped, the defendants are not liable for any damages sustained by delays or otherwise after said cattle were delivered by defendants to the next connecting carrier.

III.

The court instructs the jury that defendants are not liable, under the contract of shipment read in evidence, for any damages or delays occur-ing on any other railroad than the one operated by defendants, and if you find from the evidence that defendants
74 transported plaintiffs' cattle from Stoutsville to Hannibal without unreasonable delay and delivered said cattle to the Wabash Railway Company, as the connecting carrier, within the time usually and reasonably required for such transportation and delivery; that the defendants are not liable in this case, notwithstanding said cattle may have been unreasonably delayed on said Wabash railroad, and your finding should be for the defendants.

Which instructions, and each and all of them, the court refused to give; to which action of the court in refusing to give said instructions, and each and all of them, the defendant- then and there duly excepted at the time; and thereupon the court, of its own motion, gave eight instructions, numbered from one to eight, inclusive, as follows:

I.

If from the evidence the jury find that beyond the limit of a reasonable time for the delivery of plaintiffs' cattle at the Union stock yards at Chicago, Illinois, the Wabash Railway Company negligently delayed said delivery and thereby directly caused pecuniary damages to plaintiffs in the disposition of said cattle, the jury will find for plaintiff-, and in default of such finding the jury will find for defendant-.

II.

Negligence is the failure to exercise such care and prudence as a person of ordinary care and prudence would ordinarily exercise in performing a duty under all and the same circumstances and with the same information in the control, conduct, and management of such person's own affairs.

In the case at bar it was the duty of the Wabash Railway Company to not delay the delivery of plaintiffs' cattle at the Union stock yards in Chicago, Illinois, beyond the limit of a reasonable time for said delivery.

Unless from the evidence the jury find the Wabash Railway Company guilty of non-performance of said duty and of negligence

in said non-performance of said duty the jury will find for the defendants.

75 III.

If from the evidence the jury find for the plaintiff-, the measure for plaintiffs' damages, if any, will be the difference between the reasonable market value of plaintiffs' cattle, if any, at Union stock yards, Chicago, Illinois, on a delivery there within a reasonable time and the reasonable market value, if any, of said cattle at said place at the time when actually there delivered, if a less value.

IV.

If from the evidence the jury find for plaintiff-, and that the non-delivery of said cattle in reasonable time, if any, directly deprived plaintiff- for a time of any market for said cattle, the jury, in assessing plaintiffs' damages, if any, will allow plaintiff- the difference between the reasonable market value per pound of weight at Chicago, Illinois, at the time of a delivery in reasonable time and the reasonable market value per pound of weight at Chicago, if a less weight, at the time when a market for said cattle first accrued after there delivered; but such element of damage, if allowed, cannot exceed one-fourth of a cent per pound of the weight at which said cattle were actually weighed on sale, and the same may be as much less than said amount as from the evidence the jury may determine, the alleged one-fourth of one cent per pound being the utmost possible maximum in the weight at which said cattle were actually weighed on sale.

V.

If from the evidence the jury find for plaintiff-, and that the non-delivery of said cattle within reasonable time, if any, directly deprived plaintiff- for a time of any market for said cattle, and that pending said interval the said cattle were thereby directly caused to suffer shrinkage in weight exceeding ordinary and usual shrinkage of cattle in reasonable transit under same circumstances, the jury, in assessing plaintiff's damages, if any, will also allow the reasonable market value, if any, of such flesh so lost by such shrinkage pending such delay.

76 VI.

If from the evidence the jury find for plaintiff-, and that the non-delivery of said cattle within reasonable time, if any, directly deprived plaintiff- for a time of any market for said cattle, and that pending said interval, the plaintiff- *was* thereby directly caused to furnish feed for and to said cattle, the jury, in assessing plaintiffs' damages, if any, will also allow the reasonable market value, if any, of said feed so furnished by plaintiff- at Chicago, Illinois, pending such delay.

VII.

The total amount of damages, if any, cannot exceed six hundred and fifty-four dollars and twelve cents.

VIII.

If from the evidence the jury find for the plaintiff-, their verdict may be in the following form, filling the blanks with ciphers or amounts in money, as the jury may find from the evidence:

We, the jury, find for the plaintiff-, and assess *his* damages as follows, to wit:

For feed.....
For extra shrinkage in weight .....
For reduction in value of weight sold.....

Total .....

—— ——, *Foreman.*

Or if the jury find for plaintiff-, the jury may render verdict in the following form:

We, the jury, find for the plaintiff- and assess *his* damages at the sum of ——.

—— ——, *Foreman.*

If the jury find for defendant- the verdict may be in the following form:

We, the jury, find for the defendant-.

—— ——, *Foreman.*

To which said instructions given by the court of its own motion, and to each and all of them, the defendants objected; but the
77 court overruled said objections and gave said instructions notwithstanding; to which action of the court in overruling said objections and in giving said instructions of its own motion, and each and all of them, the defendant- then and there duly excepted at the time.

And thereupon the jury retired to consider of their verdict, and again, on the same day, returned a verdict for the plaintiff- as set forth in the judgment entered thereon; and thereupon, on the same day, the defendants filed a motion for new trial in words and figures as follows (omitting caption):

Now come the above-named defendants and move the court to set aside the verdict and judgment rendered and entered in the above-entitled cause and to grant a new trial therein for the following reasons:

I.

Because the court erred in admitting illegal and incompetent evidence offered by the plaintiffs over the objections of the defendants.

II.

Because the court erred in refusing to sustain the demurrer to the evidence asked and offered by the defendants in the nature of an instruction.

III.

Because the court erred in refusing to give legal and proper instructions prayed by the defendants.

IV.

Because the court erred of its own motion and gave illegal and improper instructions to the jury over and against the objections of defendants.

V.

Because the verdict is against the evidence and against the law and against both the law and evidence.

VI.

Because the judgment is against the evidence and against the law and against both the law and the evidence.

VII.

Because there is no evidence to support either the verdict of the judgment.

78 VIII.

Because the verdict and judgment each and both of them are for the wrong party, being for the plaintiffs when they and *and* each of them should be for defendants.

IX.

Because there is no evidence in the case to support or warrant the instructions given by the court.

X.

Because the verdict and judgment are contrary to and in conflict with the constitution of the State of Missouri and the Constitution of the United States.

XI.

Because the instructions given by the court are contrary to and in conflict with the constitution of the State of Missouri and the Constitution of the United States.

XII.

Because section 944 of the Revised Statutes of Missouri, relied upon by the court and by the court construed as applying to and controlling the contract of shipment under which plaintiffs' cattle were shipped from Stoutsville, Mo., to Chicago, Illinois, is contrary to and in conflict with the constitution of the State of Missouri and the Constitution of the United States.

JACKSON & MONTGOMERY,
Attorneys for Defendants.

And upon the next day, the same being the 28th day of April, 1892, said motion was taken up and submitted to the court, and, having been seen and considered, was by the court overruled; to which action of the court in overruling said motion and in refusing to grant a new trial the defendants then and there duly excepted at the time.

And thereupon leave was given to the defendants to file their bill of exceptions on or before August 1st, 1892.

And the defendants now tender this their bill of exceptions and pray that the same may be signed, sealed, filed, and made a
79 part of the record in this cause, which is accordingly done this 21st day of June, 1892.

THOS. H. BACON, *Judge.* [SEAL.]

JACKSON & MONTGOMERY,
Attorneys for Appellants.

And afterwards, to wit, on the 15th day of January, 1894, the respondents filed their motion to dismiss the appeal herein; which said motion is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1893.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Appellants. } Case No. 6391.

Appeal from Monroe circuit court.

To the above-named appellants:

Please take notice that the respondents in this cause will move said court on Monday, January 15, 1894, in division No. 2 of the said court, to dismiss the appeal in the above-entitled cause for failure to comply with rule 15 of said court requiring you to serve upon the respondents your brief in said cause, as required in said rule.

RODES & RODES AND
R. B. BRISTOW,
Attorneys for Respondents.

In the Supreme Court of Missouri, October Term, 1893.

McCANN & SMIZER, Respondents,
vs.
80 GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Appellants. } Case No. 6391.

Appeal from Monroe circuit court.

And now comes the respondents herein and moves the court to dismiss the appeal in this cause for the reason that the appellants

have failed to comply with rule 15 of this court in this, that the appellants have not delivered or served or caused to be delivered or served upon the respondents or *his* attorney any brief in the above-entitled cause 30 days before the day on which this case is set for hearing, and because no brief of the appellants have been delivered or served upon the respondents or their attorneys of record in this cause.

RODES & RODES AND
R. B. BRISTOW,
Attorneys for Respondents.

STATE OF MISSOURI, } ss:
County of Pettis, }

Personally appeared before me J. H. Rodes, the undersigned, and, being duly sworn, says that he served a certified copy of the within notice and motion on John Montgomery, Jr., at 9 o'clock a. m. on Saturday, January 13, 1894, by delivering a certified copy thereof to said Montgomery, of the firm of Jackson and Montgomery, at the court-house in the city of Sedalia, Missouri.

[SEAL.] Subscribed and sworn to before me this 13th day of January, A. D. 1894.

T. A. FOWLER, *Cir. Cl'k.*

And on the same day the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents, *vs.* GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway Company, Appellants.	Appeal from Monroe County Circuit Court.

81 Now, at this day, this cause coming on to be heard, and it appearing to the satisfaction of the court that the said appellants have failed to comply with the rules of this court, doth consider and adjudge that the appeal herein be, and the same is hereby, dismissed, and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution.

And afterwards, to wit, on the 16th day of January, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said appellants, by attorney, and file their affidavits in opposition to the motion to dismiss the appeal herein; and, on motion, it is ordered that the said respondents be granted 10 days in which to file counter-affidavits.

Which said affidavits are in words and figures as follows, to wit:

STATE OF MISSOURI, } ss:
County of Pettis, }

Geo. P. B. Jackson, being duly sworn, on his oath states that he is one of the attorneys for the defendant- and appellant- in the case of McCann & Smizer, respondents, *vs.* Eddy & Cross, appellants, No. 6391, pending in division No. 2 of the supreme court. This affiant says that he prepared and had printed the statement, brief, and argument on behalf of the appellants in the above case in November, 1893, and that he caused a copy thereof to be served upon J. H. Rodes, one of the attorneys for respondents, during the month of November, 1893; that on Thanksgiving day in November, 1893, the said attorney, J. H. Rodes, was in the office of this affiant, and brought with him the copy of said brief, etc., which had been served upon him, and examined the authorities cited by the appellants in said brief, using affiant's books therefor, and at the same time and place discussed the said case and the points made and authorities cited.

82 Affiant farther states that on the 8th day of January, 1894, this affiant was in Jefferson City, in attendance upon the supreme court, and whilst there inquired of the clerk if the briefs had been filed in said cause, and Mr. Fisher, the deputy clerk, examined and said that they were only filed upon one side; whereupon this affiant remarked, "Those are the briefs for the appellants," and Mr. Fisher replied that they were. This affiant farther states that he has been of the impression since said November that said briefs were on file, as he had directed them to be sent to the clerk, and the above conversation with the clerk and the deputy assured him that his understanding had been correct, and he therefore paid no farther attention to the matter; that it is still the impression of this affiant that said briefs were filed some time ago, but that if they were not it was a mere oversight and an omission on the part of the clerk in the office of affiant to carry out affiant's instructions to forward them after the same had been served in November last, and which oversight or omission would have been corrected except for the conversation above mentioned in the clerk's office of the supreme court, and that if it is a fact that said briefs are not on file, as claimed by the respondents, and if the deputy clerk was mistaken in his statement made to this affiant on the 8th of January, it arose from the fact that the abstract of the record was bound separately from the statement and brief, but whether this is the explanation of the conversation and statement of the said clerk this affiant is unable to state; but whether or not the said briefs are on file this affiant reiterates that they were served upon and used by the said attorney, J. H. Rodes, as early as Thanksgiving day in November, 1893.

GEO. P. B. JACKSON.

Subscribed and sworn to before me this 15th day of January, 1894.

[SEAL.] E. B. QUISENBERRY,
Notary Public.

And afterwards, to wit, on the 22nd day of January, 1894,
83 the following affidavit was filed in said cause, viz:

STATE OF MISSOURI, } ss:
County of Pettis, }

This day personally appears before me J. H. Rodes, who, being first duly sworn, says that he is one of the firm of "Rodes & Rodes," attorneys for the respondents in the case of McCann and Smizer, respondents, *vs.* Eddy and Cross, receivers, etc., appellants, No. 6391, lately pending in division No. 2 of supreme court of Missouri; that he has read certified copies of the affidavit of C. C. Jackson and George P. B. Jackson, filed in said cause, procured by writing to the clerk of the supreme court, and referring first to the affidavit of the said C. C. Jackson most unequivocally and positively denies that he, the said C. C. Jackson, or any one else delivered to him, the said Rodes, a copy of appellants' printed statement, brief, and argument in said cause during the month of November, 1893, or at any other time, as aver-ed in the affidavit of said C. C. Jackson, aforesaid, and the said J. H. Rodes denies that he ever had or saw a copy of the said brief, statement, and argument on different days or any day before Thanksgiving day or on said day or on any day or days before or since, as in said affidavits contained or either of them (except as will hereinafter be stated), and the said J. H. Rodes most unequivocally and positively denies that he acknowledged service of said brief at any time, or that a copy of the same was ever handed him or said acknowledgement of service ever requested of him by the said C. C. Jackson or any one else, and denies that a copy with the acknowledgement of service of the said Rodes was ever mailed to the clerk of the supreme court or could have been mailed, for reason that no brief was ever handed or delivered him for said purpose or any purpose, as stated in said affidavit-, or either or both of them. Affiant says that the only foundation that he can conceive of for the statements contained in said affidavits or either of them that "he had said brief in said office" is the fact that the said Rodes at several times has used the books in the library of the said Jackson & Montgomery in examining the law
84 of said case, and for this purpose has gone to said office, carrying with him a bound and printed abstract of the record in said case of McCann and Smizer *vs.* Receivers, which is hereto attached and profert made of the same, the service of which was acknowledged by the said Rodes at the request of the said Geo. P. B. Jackson long prior thereto. Moreover, the said affiant says that the only time he had any knowledge of the existence of said briefs alleged to have been served as aforesaid was on Thursday or Friday (either the 11th or 12th of January, 1894), being the only Thursday or Friday before the Monday following which said cause was set for hearing, when he, the said J. H. Rodes, went to the office of Jackson & Montgomery for the purpose of serving a copy of a motion and notice thereof to dismiss said cause, and, finding neither of said firm in the office, he asked the said affiant, C. C. Jackson, if he knew why briefs in the McCann and Smizer case had not been

served upon counsel for respondent-; whereupon the said C. C. Jackson said he did not know; that he supposed it had been done, and asked if I was sure the case was for trial at this term of the supreme court. I assured him this was my understanding, and he suggested that it was possible the brief had been served upon some one else (other counsel in the case); whereupon I asked him if his office record would not show and if he did not keep records of filings, etc. He said, "Yes," and went to look at his office record, and, after doing so, said, "Well, the last record is the service of an abstract of the record;" and at said time he neither claimed or intimated or suggested that he had served the same upon this affiant in November or at any other time, and affiant says that since the filing of said affidavits he has seen and conversed with both the said C. C. Jackson and G-orge P. B. Jackson, and that neither of them claim or have ever claimed or mentioned to this affiant the fact that they or either of them served or caused to be served a copy of said statement, brief, and argument, as in said affidavits claimed, and never at any time before or since filing said affidavit- have they or either of them claimed to have served the same to this affiant.

85 This affiant says that the time and place above mentioned, on Jan. 11th or 12th, 1894, the said C. C. Jackson went to the files in said office and procured what purported to be a brief in said cause and laid the same on the desk by the side of the said J. H. Rodes. This affiant says that this is the first time he ever saw said brief or had any knowledge directly or indirectly of the existence of the same, and that he never took the same out of said office, nor has he ever examined the same or any part thereof; to all of which he solemnly swears in manner and form as hereinabove stated.

J. H. RODES.

Subscribed and sworn to before me on this the 20th day of January, 1894. May 24, 1897, my term expires.

W. J. CRAWFORD,
[SEAL.] *Notary Public.*

And afterwards, to wit, on the 29th day of January, 1894, the following affidavits were filed in said cause, viz:

STATE OF MISSOURI, } ss:
County of Pettis, }

This affiant, C. C. Jackson, being duly sworn, on his oath states that he has read a copy of an affidavit of J. H. Rodes, filed in the supreme court in the case of McCann & Smizer against Eddy & Cross, receivers, which said copy has reached this affiant in the city of Sedalia on this date; that since reading the same affiant reiterates all he said in a former affidavit filed in the same cause.

Affiant further states that he did not on the 11th or 12th of January, 1894, or at any other time, state to said J. H. Rodes that they kept a record of service of any briefs or abstracts or other papers, because it is not and has not been the custom in the office to keep a record of such service.

Affiant further states that he did not say, "Well, the last record is the service of the abstract of the record," and this affiant says that there is no such record in the office as "service of the abstract of the record."

Affiant further states that he has not had any conversations whatever with said J. H. Rodes since the filing of his motion to
86 affirm in this cause.

C. C. JACKSON.

Subscribed and sworn to before me this 29th day of January, 1894.

E. B. QUISENBERRY,
[SEAL.] *Notary Public.*

My commission expires Feb. 8th, 1897.

STATE OF MISSOURI, } ss:
City of St. Louis, }

George P. B. Jackson, being duly sworn, on his oath states that he has read a copy of an affidavit of J. H. Rodes, filed in the supreme court in the case of McCann & Smizer against Eddy & Cross, receivers, which said copy has reached this affiant in the city of St. Louis on this date; that since reading the same affiant reiterates all he said in a former affidavit filed in the same cause.

Affiant farther states that he has not had any conversation with the said Rodes concerning the said case of McCann & Smizer since Thanksgiving day, in November, 1893; that he has not spoken to or with the said Rodes upon any subject whatever since the time of filing the motion to affirm the above case, except on one occasion the said Rodes and this affiant met for the purpose of agreeing upon and filing a bill of exceptions in another case, and there was no occasion for speaking of the other matter, and this affiant, being anxious to get through with that matter and take up other business that was calling for attention, did not think of the case of McCann & Smizer.

This affiant farther states that he was not present in his office, but was absent in the State of Texas for some days prior to the morning of January 14th, when at about 10 or 10.30 a. m. he first heard of the motion to affirm said judgment, and he is unable to express any opinion as to what occurred in the office on the 11th and 12th of January; but this affiant does say that some time in November, when the briefs in the above case were received from
87 the printer, he called the attention of C. C. Jackson to the same and told him to ascertain whether or not J. H. Rodes was in town, and he telephoned to the office where the said Rodes spent most of his time and the reply was received to the effect that Rodes was there, and affiant states that the said C. C. Jackson then started with several copies of the said brief, stating that he was going to make service on Rodes, and that in a short time he returned and affiant asked him if he had found Rodes and had given him a copy of the brief, and he stated that he had.

Affiant farther states that he is not mistaken about what it was that the said Rodes had on the table in the office of affiant on Thanksgiving day; that it was not a copy of the abstract of the record, but was a copy of the brief in this case; and affiant farther states that there was nothing in the abstract of the record in this case which would assist the said Rodes in examining the law of the case or would suggest to him any cases or authorities that might be cited, but that the citation of authorities was made in the said brief.

GEO. P. B. JACKSON.

Subscribed and sworn to before me this 27th day of January, A. D. 1894.

[SEAL.] JOHN S. KING,
Notary Public.

My commission will expire April 7th, 1895.

And afterwards, to wit, on the 31st day of January, 1894, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said appellants, by attorney, and file their motion to set aside the dismissal of this cause heretofore entered herein; which being fully considered by the court, it is ordered that said dismissal be, and the same is hereby, set aside; that this cause be reinstated on the docket and continued, and that the said appellants be granted 30 days in which to serve the said respond-
88 ents with copies of brief and that the said respondents be granted 30 days in which to file briefs.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1893.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY & H. C. CROSS, Appellants.

Now come the above-named appellants and moves the court to reinstate the above-entitled cause for the reason that the same was dismissed under a misapprehension on the part of the court of the fact in regard to the service of brief by the appellants; that the attorney of appellants who was in charge of said case was absent in Texas until the morning of January 14th, on which day the said case was dismissed; that notice of the motion to dismiss was first left in his office with the clerk on Saturday, January 12th; that immediately upon receiving notice of said motion at about 10.30 a. m. on January 14th, the said attorney at once set about to prepare affidavits, which have already been filed in this cause, and to which

reference is now made, and it is asked that the same be considered in support of this motion.

JACKSON & MONTGOMERY,
Attorneys for Appellants.

And afterwards, to wit, on the 16th day of April, 1894, the following further proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said parties by attorneys and submit this cause to the court on briefs.

And afterwards, to wit, on the 30th day of June, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEORGE A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway Company, Appellants.
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Appeal from Monroe County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid in form aforesaid by the said Monroe county circuit court rendered be reversed, annulled, and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said appellants recover against the said respondents their costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1894. Division No. 2.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Receivers Mo., K. & Tex. R'y Co., Appellants.

Appeal from Monroe Circuit Court.

Opinion.

Hon. THOS. H. BACON, *Judge:*

Action to recover damages based on delay in the shipment of a lot of cattle from Stoutsville, in Monroe Co., Mo., to Chicago, Ill.

The delay complained of occurred in the latter State and on a connecting road.

The contract on which this action is bottomed is, so far as necessary to quote it, the following:

"*Rules and Regulations for the Transportation of Live Stock.*

No station agent or receiver of this railway has any power or authority to bind the receivers in regard to shipment of live stock except by written contract in the following form: * * *
90 All kinds of live stock will be taken under the provisions of and at the rates and weights provided for by the tariff classification applying to the territory in which the shipment originates.

In case the owner or consignor agrees to hold these receivers free from liability from any and all causes enumerated in the following contract, * * * the rates agreed upon and specified in the contract will be given."

"*Live-stock Contract* (*No.* 10).

Executed at Stoutsville station, Missouri, November 12th, 1890.

This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that, whereas, the receivers of the Missouri, Kansas and Texas railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: Six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½ c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows: * * *

13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability
91 of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas railway, excepting to protect the through rate of freight named herein."

Plaintiffs recovered judgment and defendants appeal.

The section of the statute involved in this litigation is the following:

SEC. 944. Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained.

1. It has been ruled in Dimmitt *v.* Railroad, 103 Mo., 433, under the provisions of the quoted section (then section 598) that it was competent for a common carrier by specific agreement to agree to carry the property only to the terminus of its own line, or what is equivalent thereto by similar agreement to limit its liability to loss or damage occurring on its own line. This ruling was followed in Nines *v.* Railroad, 107 Mo., 475.

In an earlier case, Snider *v.* Express Co., 63 Mo., 376, before the enactment of the statute in question, a similar ruling was made.

In the case at bar the instrument which is the basis of this
92 action is to be considered as a whole. Construing it in this way, it is easy to see that the liability apparently assumed by the first clause of the contract is expressly qualified and limited by the 13th specific agreement aforesaid, which is clear and unambiguous terms confines the liability of the defendant company to its own line of road.

In consequence of this, and in consequence of the defendant company having promptly delivered at the terminus of its line the cattle to the connecting carrier, there was error committed by the trial court in refusing the third instruction asked by the defendant, to wit:

3. "The court instructs the jury that defendants are not liable, under the contract of shipment read in evidence, for any damages or delays occurring on any other railroad than the one operated by defendants, and if you find from the evidence that defendants transported plaintiffs' cattle from Stoutsvitle to Hannibal without unreasonable delay, and delivered said cattle to the Wabash Railway Company as the connecting carrier within the time usually and reasonable required for such transportation and delivery, then the defendants are not liable in this case, notwithstanding said cattle may have been unreasonably delayed on said Wabash railroad, and your finding should be for the defendants."

2. If the section under discussion is to be construed literally; if it is to be interpreted as casting on one railway company the bur-

den of the negligence of another railway company, against whose negligence the company sued has explicitly contracted, as in the present instance, then I have no hesitation in saying I do not believe that the legislature has the power thus to interfere with the right of a railway company to contract, speaking in a general way, as it may deem fit.

This power of individuals or corporations to contract as they think best has been recently decided by this court to be placed beyond legislative interference by constitutional guarantees, both State and Federal, which upheld the right of "due process of
93 law" and all that term implies. State *v.* Loomis, 115 Mo., 307. See also The Matter of Jacobs, 98 N. Y., 98; Butchers' Union cases, 111 U. S., 746; *In re* Sam. Kee, 31 Fed. Rep., 680.

The same ruling is applicable in this case; and it is equally beyond the power of the legislature, without fault on the part of the railway company complained of and in spite of a contract to that effect to the contrary, to cast upon such company the burden of paying for losses incurred through the negligence of another and distinct corporation.

Of course, as against its own negligence a corporation would not be allowed to contract; for this would be subversive of public policy, and, besides, would be an abdication of the duties and functions as common carrier, which, by the very terms of its charter, it would not be allowed to abdicate nor abrogate.

But contracting against the negligence of another corporation rests upon a different footing altogether.

3. Moreover, if section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of interstate commerce, and therefore violative of section 8 of article 1 of the Federal Constitution. Stanly *v.* Railroad, 109 Mo., 435.

Any rule pertaining to the transportation of passengers or merchandize from one State to another is a regulation of interstate commerce, and therefore, under the prohibitions of the Federal Constitution, a State is inhibited from making such regulations. Case of the State Freight Tax, 82 U. S., 232.

In order to conspicuously show that the statute construed as plaintiffs desire is plainly such a forbidden regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandize transferred to that State from this State, and at variance with section 944 aforesaid. As is aptly elsewhere said, "Commerce cannot flourish in the midst of such embarrassments." Hall *v.* De Cuir, 95 U. S., 485. See also Gibbons *v.* Ogden, 9 Wheat., 1; Pickard *v.* Pullman, 117 U. S., 34; Hardy *v.* Railroad, 18 Am. & Eng. R. R. Cas., 432; Carton *v.* Railroad, 59 Iowa, 148; Louisville *v.* Com'rs, 16 Am. & Eng. R. R. Cas., 1.

94 For the foregoing reasons, as it is evident that plaintiffs have no standing in court, the judgment will be simply reversed.

All concur.

T. A. SHERWOOD.

And afterwards, to wit, on the 10th day of July, 1894, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Come now the said respondents, by attorney, and file their motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, viz:

In the Supreme Court of Missouri, Division No. 2, April Term, 1894.

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas & Texas Railway, Appellants. } No. 6391.

Motion for Rehearing.

Comes now McCann and Smizer, respondents in the above-entitled cause, and moves the court to grant them a rehearing therein for the following reasons:

I.

Because the court entirely overlooked and consequently misstated the ground upon which plaintiffs sought to recover in this action, and, though innocently, it yet erroneously places plaintiffs' counsel before the bench and bar of this State in the attitude of contending for a construction of law at variance with the Constitution of the United States and the State of Missouri and repugnant to reason and justice.

II.

Because the court wholly overlooked the principle of law announced by the plaintiffs and because the court considered
95 and decided the cause upon a theory not only not contended for by plaintiff-, but by plaintiff- specifically disowned in a separate point in *his* brief and farther emphatically disavowed in *his* written argument.

III.

Because the court overlooked the fact that when the receiving carrier entered into a written obligation of through carr-age it undertook, by voluntary contract, to carry beyond its own lines, and in pursuance of its said contract took exclusive possession, control, and management of said cattle to their entire destination, and contracted with and paid the Wabash and made all necessary arrangements with it to complete, for appellants, its contract of shipment, whereby appellant- made the Wabash Company as much *its* agent and servant from the place of the terminus of the line of the M., K.

& T. on to Chicago as *its* own employees were *its* agents from the place of plaintiffs' delivery of the cattle, at Stoutsville, on to the terminus of *its* own road; that by appellants agreeing to transport over the connecting carrier's line and obligating *itself* to carry beyond its terminus the law thereupon fixed upon *it* a liability for the negligence of *its* servants thus employed by *it* in such further transportation, and against which negligence they could not contract. In other words, appellants' liability for negligence against which *it* could not contract was coextensive with *its* duty to transport, whether such duty was imposed by law or assumed by contract; and therefore in just so far as *it* extended *its* obligation by a contract to carry, just so far the law divests them of the power to contract against the liability which they have by contract voluntar-ly assumed.

IV.

Because the court overlooked the fact that by reason of appellants employing *its* connecting carrier, the Wabash Co., as *its* agent to complete *its* contract of shipment that portion of the contract by which appellants sought to be "released from all liability after said live stock left *its* road" was thereby rendered void; for although the stock had left *its* road, it was delivered by *it* into the hands of *its* other servants, who were thereafter as much appellants' agents as were the employees of *its* own road. Should the court give vitality to this clause in the construction of the contract it is thereby permitted appellant- to contract against the negligence of *its* own chosen agent. It was affirmitively shown at the trial that *its* said agent, The Wabash Co., was guilty of the grossest negligence, whereby the damage and injury was caused to plaintiff-.

96

Because the court overlooked the fact that there was affirmative proof of total lack of consideration for said alleged release.

J. H. RODES,
Att'y for Respondents.

Application of Reasons for Reconsideration.

Such are the convictions of respondents' counsel that his duty to his clients, this court, or himself would be indifferently discharged, if not grossly neglected, did he not again respectfully though earnestly and importunately urge upon this court what he regards a necessity for further consideration of the law and the facts by which he so steadfastly believes this cause should be determined. Plaintiffs further ask from the court a most respectful consideration of this amplification, as it is made apparent from the first point brought to the court's attention in his motion that there is presented to the court what might be well termed a privileged question, and on presentation of the different grounds of the motion the same order will be followed as that in which they are presented therein. The court's attention is respectfully called to points I & II in said motion, which on account of their similarity will be jointly con-

sidered. In this point it is contended—and we think we can make it perfectly apparent—that the learned judge who wrote the opinion evidently misunderstood, wholly misconceived, and overlooked our contention of law, and has decided the case and written the opinion upon a view entirely foreign to the theory for which we so earnestly contended upon almost every page of our brief. This mis-
97 conception grew out of the apparent impression upon the part of the court that plaintiff- sought a recovery founded upon a right conferred upon them by section 944 of Revised Statutes 1889, while, indeed, such was the least of all plaintiffs' contentions, either before the trial or appellate court. The plaintiff- did not urge nor the trial court instruct the jury nor was the cause tried upon the theory that the statutes either conferred any right nor denied any remedy that plaintiff- did not have under *his* contract and would have had under it had the statute not been enacted.

This was appellants' contention: "That plaintiff- had no right except such as was conferred by said statute, and counsel made this point II in their brief, and they contend that the court ignored the construction of the statute given by the court in the Dimmitt case, and that such construction was in conflict with the State and Federal Constitution." Plaintiff-, to correct this misstatement of *his* contentions before the court, made a separate reply thereto on page 14 of *his* brief on file, which is as follows:

III.

"Appellants' 2nd point, made in their brief on file, has no application to the law under the plaintiffs' view of the case. The statute referred to has been construed to be no limitation upon the right to contract."

Citing Dimmitt *vs.* R. R., 103 Mo., 443.

Accepting thus and thereby the construction placed upon the statute in the Dimmitt case, and also elsewhere in *his* written argument commenting with approval thereon, and to further aid the court in understanding our position, the plaintiff- at the very outset ever prefaced *his* argument, "pg. 14 brief on file," with the following: "Since there seems to be such radical difference between the respondent-' and appellants' counsel, not only as to appellants' liability, but as to their ground of liability, the respondents have undertaken to faithfully set out in their statement of the facts all the material evidence upon which they base their right of recovery." Again on pg. 14, in 9th line of *his* argument, is the following: "It is therefore conceded that the right of the plaintiff- and the
98 liability of the defendant- must be determined upon a construction of said contract of shipment," set out on pages 30 to 37 of Abs. Indeed, nowhere in plaintiffs' statement of facts or in *his* brief or argument or elsewhere, either before *nisi prius* or appellate court, was any other theory or contention directly or indirectly urged, but, on — contrary, emphatically disavowed.

In fact, respondent-, so far as any contention to the contrary is disclosed, might well agree, as *he*, in fact, does agree, with all that

the learned judge has said in the opinion on file regarding the constitutionality of the statute quoted therein, if it were literally construed, both in relation to the State and Federal Constitution. The plaintiff- nowhere contended for such a construction; on the other hand, accepted and commented with approval upon the rule of construction adopted by the court in the Dimmitt case and cited said case alone under point III, and also cited the same case under point I as furnishing ample authority in support of his contentions. Again, beginning on the 12th line of the 18 pg. of our brief on file and continuing to the middle of the 20th pg. thereof, the plaintiff- expressed at length what *he* earnestly believes to be the true holding in the Dimmitt case, and *he* believes that there is perfect harmony between the views expressed in said opinion and the rule of law contended for in our construction of the case at bar.

It will be born- in mind by the court that this complaint of respondents' counsel is not made in the spirit of unfriendly criticism, for the well-known character of the author of this opinion would preclude any possibility of any intentional misrepresentation of the humblest contentions of the least worthy advocate of the forum.

That the court has so misconstrued plaintiffs' contentions, we beg to call the court's attention particularly *of* its language on the top of page 5 of the typewritten opinion of the court filed in this
99 case. This language, after a discussion of the statute regarding its scope, application, and constitutionality, is as follows: "In order to conspicuously show that statute, construed as plaintiffs desire, is plainly such a forbidden regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandise transferred to that State from this State and at variance with section 944 aforesaid. As is aptly elsewhere said, 'Commerce cannot flourish in the midst of such embarrassments.'"

It has already been shown conclusively that plaintiffs neither desired nor contended for any such construction, and the honorable judge, upon being informed, will not uphold counsel before the bench and bar of this State as the advocate of such an untenable and unsound, if not senseless, contention.

We shall now ask the court's attention to the consideration of points III and IV, which on account of their similarity will be discussed together.

In doing so we will be as brief as we can consistent with the importance of the principle involved. We hope to make ourselves clearly understood, and when we succeed in doing so we feel assured that the court will fairly and unevasively decide our contention, and if, in the court's opinion, our position is tenable and just before the law, will magnanimously so decide. In discussing these points we shall aim to point out what we regard as an oversight of a principle of law upon the part of the learned judge in his construction of the contract. Before, however, doing so we wish to announce some of the principles of law and facts which govern the construction of this contract:

1st. That a carrier cannot in this State contract against his own negligence or the negligence of his agents. Halliday *v.* The St. L.,

K. C. & N. R'y Co., 74 Mo., 162; Baker *v.* R. R. Co., 34 Mo. App., 112; Railroad Co. *v.* McCarthy, 96 U. S., 266; 1 Wood R'y Law, sec. 190, pg. 545; Loomis *v.* W., St. L. & P. R'y Co., 17 Mo. App., 350; Grover & Baker Machine Co. *v.* Mo. P. R'y Co., 70 Mo., 674; Hutchinson on Carriers, 2nd ed., secs. 248, 257, and 263; Dimmitt *v.* R. R. Co., 103 Mo., 433; R. R. Co. *v.* Lockwood, 17 Wall., 357; Wharton on Neg., sec. 589.

100 2nd. That because of the existence of a written contract of shipment the statute referred to has no binding force or effect upon the appellant or its contract, and if bound at all it must be by virtue of its contract of through shipment.

Dimmitt *vs.* R. R., 103 Mo., 433.

3rd. That where negligence is permitted to be contracted against it must be clearly and unequivocally expressed. Where the terms employed are doubtful a stringent liability will determine the contract.

Hutchinson on Carriers, 2 ed., sec. 270.

4th. That appellants' undertaking was to transport the entire distance and to carry beyond the terminus of their line to point of destination.

5th. That the Wabash Co., though a connecting carrier, was employed and paid by appellant- to complete *its* contract of shipment entered into with plaintiff-.

6th. That it is proved affirmatively that the Wabash Co. was guilty of gross negligence which caused plaintiffs' damage.

7th. That it was clearly proven at the trial that no reduced rate lower than the regular rate was furnished plaintiff-, as alleged in the contract.

8th. That the carrier may in most cases, by special contract, for valid consideration, alter or modify its common-law liability almost *ad libitum*, but that such power is unalterably limited so as to prohibit it in most of the American States, especially Missouri, from contracting against liability for its negligence or the negligence of its agent. This rule and reason for the same is aptly stated in Lawson on Contracts, sec. 332 of edition 1893, as follows:

"In this contract it is held that he (the carrier) may limit his liability as an insurer by special contract, but he cannot by any contract exempt himself from responsibility for the consequence of his own negligence or the negligence of his servants or agents, contract of the latter kind being considered as void, because they are

101 against public policy and because they are supposed to be obtained under circumstances which give to the carrier an undue advantage in obtaining terms which the law cannot enforce without giving its sanction to injustice and oppression." Lawson on Contract, edition 1893, sec. 332; Lawson on Contracts of Carriers, pg. 46; Hutchenson on Carriers, 2nd ed., secs 248, 257, & 265; Halliday *v.* R. R. Co., 74 Mo., 162; Baker *vs.* R. R. Co., 34 Mo. App., 112.

Abundant evidence of the facts stated above and ample authority for the principles of law announced may be found in the abstract

of the record and in the brief of respondents' counsel, duly on file in court.

With permission of the court we shall now further announce what we discovered to be, as we think, the true rule of liability of the carrier for negligence in this State and the principle upon which the law of such liability is founded.

1st. His indefeasible liability for negligence is coextensive with his obligation to carry, whether such obligation to carry arises from law or contract. Now, if we follow this well-established principle of law, we think it will clear away difficulties and bring harmony where confusion will otherwise exist.

When we apply the doctrine to cases where the liability for negligence exists by law we find many adjudicated cases in this State. This applies to all cases where the carrier receives goods to be shipped over his own line. And why? And on what principle of law does the doctrine rest? Because it holds itself out as a public carrier over the distance traveled by your own road, and the law not only binds it to carry the goods of the public so far, but to do so without negligence. Here its duty to carry is one of law, and the liability for negligence is one of law, against which the carrier cannot relieve himself.

Now, it is well-established doctrine in this State that the carrier may limit its liability to negligence on its own road. Why? Because it is not bound in law to carry beyond its own road. But the law says, "You must watch for yourself. If you come in and bind yourself by contract to carry beyond your road, then the law
102 will follow you, like your shaddow, with the same indefeasible liability to so carry without negligence; and while you may limit your liability on the connecting carrier's road over which you agree to carry, you may do so to that extent only which you could limit your liability on your own road, for now you have assumed voluntarily the duty to carry. You cannot by any devise, directly or indirectly, in the same contract or any special contract, limit your liability against the negligence of the agent you employ in such further transportation, and your attempts to do so are void." This is the principle contended for, which we contend the learned judge overlooked in the construction of the contract; that he gave force and effect to the 13th clause, which was void; void because the carrier had voluntarily assumed the duty to carry beyond its own road, and which it was not bound in law to assume, but, when it was assumed, it was assumed *cum onere*. It could not reap the advantages without the disadvantages of a through contract.

When it assumed the obligation to carry *eo instanti* the law fixed its liability. As aptly expressed by Lawson on contracts:

"The law attaches his responsibility to his employment or calling, and, if he assumes the calling, he has no power over the duties which the law annexes to his calling. He, assuming the character of a common carrier, depends entirely on his own will and assent; but if he undertakes the occupation, the liabilities which come upon him in respect of goods brought or borne to him to be carried *and* imposed by law and not created by assent or agreement."

Now, applying this principle to cases cited by the learned judge as authority for his decision, we find that they were all cases where the carrier had not bound itself by contract to carry further than its own line, and hence might well by specific agreement only contract to carry property to the terminus of its own line, or, what is equivalent, enter into a special agreement that it will be liable only for loss or damage occurring on its own line, but the court
103 never meant to say that it could by contract assume the duty to carry beyond its own line and at the same time in the same or any other agreement say that it would be liable for nothing beyond its own road.

For, even if the court would uphold such cause, it would not so construe it as to release them from the negligence of such connecting carrier.

Hutchinson on Carriers, 2nd ed., secs. 261 & 264 & 270.

The doctrine of *contra preferentem* has a right application.

Now, the case of Snyder *vs.* Express Co., 63 Mo., 376, referred to by the court, was a case where the express Co. had not contracted for a through carr-age and, of course, might limit their liability to their own line, because they did not assume to carry beyond and the connecting carriers were not made their agents.

The same is said of the Dimmitt case and the Nines cases cited by the learned judge. In none of those cases had the carrier bound itself to carry beyond its own line, and for this reason might by specific contract limit their liability to their own road. Indeed, the court in the Dimmitt case says at the outset:

"At the time of the enactment (meaning the statute) the law was as well settled as now that a common carrier may *contract* (underscoring the word *contract*) to carry to a place beyond the terminus of its own road and thereby render himself as such liable for the whole distance."

What language could be plainer than this?

That is exactly what appellant has done in the case at bar. It has contracted to carry beyond its terminus and has thereby rendered itself liable for the whole distance.

There is a 5th point that might be pressed, but we sincerely hope that enough has been said to convince the honorable court that we are righteously contending for a principle clearly established in the basix law of this our jurisprudence, and that we have so addressed ourselves to the understanding of the court that our position
104 may be clearly seen and understood; but let us call attention to the only direct ruling on this point which we can find, which is in the case of Halliday *vs.* Railroad, 74 Mo., 162, which case arrose before the enactment of the statute, where the court says in unequivocal language, in a contract exactly like the one at bar, construing the effect of the identical clause, *says:*

"As the contract of the plaintiffs with the carrier was for the entire route, he could not stipulate for exemption for all liability beyond the terminus of his own line."

This case has never been overruled.

J. H. RODES,
Att'y for Respondents.

Geo. P. B. Jackson. Jno. Montgomery, Jr.

Jackson & Montgomery, lawyers.

SEDALIA, Mo., *July* 9, '94.

We hereby acknowledge notice of motion for rehearing in McCann & Smizer *v.* Receivers, in supreme court.

JACKSON & MONTGOMERY.

And afterwards, to wit, on the 15th day of October, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, denied.

And afterwards, to wit, on the 17th day of October, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said parties, by attorneys, and suggest the
105 death of George A. Eddy and H. C. Cross, receivers, appellants herein; thereupon comes the Missouri, Kansas and Texas Railway Company and enters its voluntary appearance herein, and, upon motion and by consent of said parties, it is ordered by the court that this cause stand revived in the name of the Missouri, Kansas and Texas Railway Company, and, upon motion, the said respondents are granted 5 days in which to file a brief, and that the order overruling the motion for rehearing herein be hereby set aside.

Which said suggestion is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri, October Term, 1894.

McCANN & SMIZER, Plaintiff-,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway Company, Defendants.

It is hereby stipulated *that* the above-entitled cause as follows: Whereas both of the above-named defendants, Geo. A. Eddy and H. C. Cross, have departed this life since the last adjournment of the court; and

Whereas there is a question in regard to the proper practice in the matter of the revivor of this cause; and

Whereas the property heretofore in the hands of the said defendants, as receivers, has been turned over to the Missouri, Kansas & Texas Railway Company under orders of the proper courts appointing said receivers:

Now, therefore, upon the meeting of the supreme court of the State of Missouri, the deaths of said defendants shall be suggested to the court, and thereupon the said Missouri, Kansas and Texas Railway Company will offer to be made a party defendant in said cause, and all the delays and proceedings incident to an ordinary *scire facias* shall be waived, and the court may thereupon enter an order substituting the said Missouri, Kansas and Texas Railway Company as the party defendant in said cause, and that said cause
106 shall stand revived in the name of said Missouri, Kansas and Texas Railway Company as defendant, and all further proceedings in the said cause may be conducted by and in the name of the said Missouri, Kansas & Texas Railway Company as such defendant, and both parties hereby agree to adopt all pleadings and proceedings heretofore filed, taken, or had in said cause, and agree that whatever judgment may be entered by the supreme court of Missouri in said cause so revived, as aforesaid, shall have the same effect upon the parties to said revived cause as if they and each of them had been respectively plaintiff and defendant since the commencement of this suit, and if the judgment in said cause should be to any extent or any manner affirmed, then the same shall have the same force and effect against said Missouri, Kansas & Texas Railway Company as if the judgment had been originally entered against it in the circuit court; and if the said judgment shall be modified in any form or shall be reversed, then such modification or reversal shall inure to the benefit of the said Missouri, Kansas & Texas Railway Company in the same manner and to the same effect as though said railway company had all the time been the party defendant in this case; and all orders and judgments which may hereafter be made or entered in said cause in any court shall have the same effect in establishing any right in favor of the plaintiff, or in limiting the liability of the said defendants or of the said railway company, or in barring the right of action against them or any of them in the same manner and to the same effect that would have been the case if there had been no change of parties or if the said Missouri, Kansas & Texas Railway Company had all the time been the defendant in said cause.

In witness whereof the parties hereto affixed their names, by their proper attorneys, this 15th day of October, 1894.

McCANN & SMIZER,
Plaintiff- and Respondents,
By J. H. RODES, *Their Attorney.*
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
107 *Substituted Defendant and Appellant,*
By JACKSON & MONTGOMERY,
Its Attorneys.

And afterwards, to wit, on the 22nd day of December, 1894, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, sustained, and that this cause be set for hearing January 19, 1894.

And afterwards, to wit, on the 19th day of January, 1895, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 12th day of July, 1895, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Now, at this day, it is ordered by the court that this cause be transferred to the court in banc.

And afterwards, to wit, on the 10th day of October, 1895, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 10th day of December, 1895, the further following proceedings were had in said cause, viz:

108 McCann & Smizer, Respondents,
vs.
Missouri, Kansas & Texas Railway Company, Appellant.
Appeal from Monroe County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court, have been now sufficiently advised of and concerning the premises, doth consider and adjudge

that the judgment aforesaid, in form aforesaid, by the said Monroe county circuit court rendered be in all things affirmed and stand in full force and effect, and that the said respondents recover against the said appellant their costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, in Banc, October Term, 1895.

McCann & Smizer, Respondents,
vs.
Eddy *et al.*, Appellants.

This action is to recover damages against defendants, as receivers of the M., K. & T. Railway Company, for negligent duty in the transportation and delivery of 95 head of cattle from Stoutsville, in Monroe county, in this State, to Chicago, in the State of Illinois.

Stoutsville is a station of the road operated by defendants. Hannibal is the eastern terminus of their road. From that point the Wabash R'y Co. operates a road to Chicago. The cattle were delivered by defendants to the Wabash Company in a reasonable time and in good order, by which they were carried to Chicago. The negligence complained of was committed on the Wabash road and by its employés.

So much of the contract under which the shipment was made as is necessary to an understanding of the questions involved is as follows:

109 Rules and regulations.—"In case the owner or consignor agrees to hold these receivers free from liability from any and all causes enumerated in the following contract; also agrees to load, feed, water, and attend to the stock himself, etc., as specified therein, the rates agreed upon and specified in the contract will be given."

Live-stock Contract; Executed at Stoutsville Station, Mo., Nov. 12, 1890.

"This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that, whereas, the receivers of the Missouri, Kansas and Texas railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: Six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff

rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:

The first and thirteenth of these covenants are as follows:

1st. That he hereby releases the party of the first part from the liability of common carrier in the transporta'ion of said cattle and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive, release and hereby does release said first party from any and all liability for and on account of any delay in shipping said stock, after
110 the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent.

13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto — that the party of the first part shall not be held liable for anything beyond the line of the Missouri, Kansas & Texas railway, excepting to protect the through rate of freight named herein."

The contract was signed by both parties, and under it defendants claim exemption from liability.

Defendants asked, but the court refused to give this instruction:

"The court instructs the jury that under the contract read in evidence under which plaintiffs' cattle were shipped the defendants are not liable for any damages sustained by delays or otherwise after said cattle were delivered by defendants to the next connecting carrier."

The court, of its own motion, gave this instruction:

"If from the evidence the jury find that beyond the limit of a reasonable time for the delivery of plaintiffs' cattle at the Union stock yards at Chicago, Illinois, the Wabash Railway Company negligently delayed said delivery and thereby directly caused pecuniary damage to plaintiffs in the disposition of said cattle, the jury will find for plaintiff-, and in default of such finding the jury will find for defendant-."

The evidence tended to prove the negligence charged and the resulting damages.

The judgment was for plaintiffs, and defendants appealed.

I. This appeal involves the interpretation of the contract under which the cattle were shipped and a determination of the effect that should be given the clause exempting defendants from "all liability of every kind after the cattle left its road."
111 As the contract must be considered so as to give proper effect to the statute, the interpretation of section 944 in its application to the contract is also necessary.

That statute is as follows:

"Wherever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

This section was construed in the Dimmitt case (103 Mo., 440), and its application to the contract there in question was determined.

In that case it was held that the general effect of the statute and its evident purpose was to apply to common carriers the English rule of duty and liability in respect to the carriage of property beyond their own route, as distinguished from the American rule which was at the time recognized as the law in this State.

In that case the goods were consigned to a point beyond the route of the receiving carrier, and there was no express limitation by contract not to carry to their destination. The court held that under the statute the receiving carrier was liable for the loss of goods occurring through the negligence of the carrier to which it had delivered them for transportation to their destination.

This ruling was in accord with the decisions of the English
112 courts, but under the law as it existed in Missouri prior to the statute, upon the facts shown to have existed, the receiving company would not have been liable for the loss.

There is no doubt the statute by its very terms has the effect of applying the English rule so far as it makes the receiving carrier responsible for the defaults of other carriers through whose agencies it undertakes to complete the contract of carriage. This is as far as the decision in the Dimmitt case goes.

But the statute can only be held to adopt so much of the English rule as is consistent with it. It cannot properly be held to abrogate the existing law in this State unless inconsistent with it. The statute engrafted upon the law of this State as it then existed makes the rule by which we must be governed. The English law does not make it.

To the extent, then, that the statute declares the English rule, the decisions of the English courts would be authority for its interpretation, but they would not be authority where the statute and the rule conflict. The statute must be interpreted in the light of our own law, and, so far as possible, in conformity to it.

In the Dimmitt case, *supra*, the court says:

"By its provisions the act of acceptance by a common carrier of property to be transferred to a place beyond the terminus of its route is evidence of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading for property to be transferred to a place beyond the terminus of the route of a common carrier is evidence of a contract by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, or, what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line."

This is a fair statement of the interpretation given by the English courts to contracts for transportation beyond the route of the
113 receiving carrier. Hutchinson on Carriers, sec. 147; Lawson Cont. of Car., sec. 238.

The law as stated is also within the terms of the statute and is inconsistent with the law of this State as previously declared by this court. Coats *v.* Express Co., 45 Mo., 238; Snyder *v.* Express Co., 63 Mo., 376.

The provision of the statute is that "wherever property is received by a common carrier to be transferred from one place to another." This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier.

There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit his duty and obligation to carriage over its own route.

But it seems that under the decisions of the English courts a carrier can also limit his liability to a loss of damages occurring on his own route by specific agreement that it should only be so liable.

In the Dimmitt case the rule is stated to its full extent, though unnecessary to the decision in that case, there having been no attempt to make such limitation.

While, under the decisions of this court, it has been held that a carrier could, by contract, limit its common-law liability of insurer, it was before the statute and has been since uniformly held that he could not, by contract or otherwise, relieve himself from liability for loss or damage occasioned by his own negligence or that of his agents or employés.

Such was the law when this statute was enacted. There is nothing in the statute that indicates an intention to change it. Indeed it seems to be recognized, for the statute by its terms only declares a liability for loss or damage caused by negligence.

The dictum of the court in the Dimmitt case, to the effect that an agreement that a carrier should only be liable for loss or damage occurring on its own line is equivalent to an express contract
114 to carry the property only to the terminus of its own line, cannot be taken as the law of this case, where there is an ex-

press contract and also an agreement for non-liability. Where the original undertaking is in doubt such an agreement might be evidence of the intention of the parties in respect thereto. This question is not involved here and need not be decided.

We cannot therefore give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would in effect operate as a repeal of the vital provisions of the law which declares a conclusive liability in such case.

The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and declare a liability for negligence, without regard to which was in fault.

Under these views of the law no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of defendant to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such qualification of the contract. It can only be held to relieve defendant from its common-law liability of an insurer.

The ruling of the court in respect to giving and refusing the instructions mentioned was correct.

II. We are unable to see, as contended by defendant, that the construction we gave this statute makes it repugnant to the provisions of the Constitution of the United States which gives to Congress alone the power to regulate commerce among the States.

The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States, subject to congressional regulations.

115 The statute merely prohibits a carrier who by contract undertakes to transport property to a point beyond its own route from relieving itself of responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law, from considerations of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other States.

A statute of Iowa which provided that no contract of a common carrier should exempt it from its common-law liability was held by the supreme court of that State not to be in conflict with the commercial power of Congress prescribed by the Constitution. Hart *v.* Railroad Co., 69 Iowa, 490; see also to the same effect Solon *v.* R'y Co., 63 N. W. (Iowa), 692, and Bogg *v.* R'y Co., 14 L. A. Reporters (N. C.), 596.

The judgment is affirmed.

All the judges concur except Sherwood, J., who dissents.

G. B. MACFARLANE.

And afterwards, to wit, on the 18th day of December, 1895, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
M., K. & T. R'Y Co., Appellant.

Come now the said appellants, by attorneys, and file their motion for rehearing herein.

In the Supreme Court of the State of Missouri, October Term, 1895. In Banc.

McCANN & SMIZER, Respondents,
vs.
EDDY & CROSS, Receivers, Appellants. } # 6391.

Motion for Rehearing.

Now comes the appellants in the above-entitled cause, The Missouri, Kansas & Texas Railway Company, in whose name the same has been revived as defendant and appellant, and moves the
116 court to grant a rehearing in this case for the following reasons:

Because the court overlooked and misconceived the true character, meaning, and effect of the contract sued on in this case and construed the contract to be an absolute and *unconstitutional* agreement to carry from Stoutsville, Missouri, to Chicago, Illinois, whereas the contract in its terms is expressly stated to be conditional, which point was expressly urged upon the attention of the court in the appellant's brief heretofore filed.

Because the court overlooked the real nature of the contract and of the controversy in this case and erroneously assumed that the release from liability was made by the contract to depend upon the rule and regulation printed at the head of the paper upon which the contract was written and also upon the stipulation in the contract for the special rate of freight and erroneously assumed that the appellants' contention was based upon such theory, whereas the correct reading of the contract shows that such was not the case, and whereas the appellant in its original brief expressly urged upon the court that such was not the case, and that it was not an attempt to secure release from liability upon any such consideration, and that the thirteenth paragraph of the contract, whereby the initial carrier was released from liability beyond its own line, was a part of the statement showing the extent and limit of the contract.

Because the court overlooked the question presented by appellant in its brief that the contract when properly construed was not one for through carriage, but simply one for the guaranty and protection of a through rate of freight named therein, it appearing from the opinion that the court wholly failed to consider or even notice that question or the fact that the contract recited that it was only made to protect a through rate of freight, although this proposition was urged upon the attention of the court in appellant's brief.

Because the court overlooked the fact that the contract which it now assumes to have been made was not made by the carrier
117 at all, but is wholly different from that which was clearly manifested by the intention of the carrier, and that the contract upon which the opinion of the court is based is one different in terms and substance from that entered into and signed by the parties, and that to permit the judgment and opinion to stand would be to substitute a contract wholly different from the one entered into by the parties.

Because the court has misconstrued the statute as it has heretofore been interpreted in this court in that by this opinion the statute is said to authorize a carrier to avoid liability beyond its own line only by limiting its contract of carriage to the end of its own route, in which event there could be no liability beyond its own line, because there would be no carriage beyond, so far as the contract is concerned; hence no necessity for the aid of any statute.

Because the court has misconstrued the nature and meaning of the case of Dimmitt *vs.* R'y, 103 Mo., 440, in attempting to make a part of that opinion mere obiter, whereas the part thus indirectly repudiated stands upon exactly the same footing as the part which it is attempted to sustain.

Because the court entirely overlooked and ignored a subsequent opinion of this court in division No. 2 in the case of Nines *vs.* R'y, 107 Mo., 475, in which the identical proposition presented in this case and contended for by the appellant was decided in favor of the appellant's contention and contrary to the result reached in this case.

Because under the various rulings and opinions of this court, including the opinion in the present case, the law as construed and declared by this court is wholly inconsistent and inharmonious, and a rehearing should be granted in this case in order that this case may be made to harmonize with the previous expressions of this court upon the same question, or, if the court had concluded that the former decisions were erroneous, that the same may be overruled and the statute allowed to stand with the force and effect
118 and subject to the same objections as to its validity which are sought to be avoided in the Dimmitt and Nines cases.

Because the court, in holding the act in question to be constitutional, wholly ignored the former opinion of division No. 2 in this case, as reported in the 27th Southwestern Reporter, 541, and also overlooked the previous decisions of this court in the case of Stanley *v.* R'y, 100 Mo., 435, and the case of Grimes *vs.* Eddy (division No. 2), 27th Southwestern Reporter, 479–483, and the same case in banc, 126 Mo., 168, which opinions counsel for appellants inadvertently omitted to cite.

GEO. P. B. JACKSON,
Attorney for Appellant.

And afterwards, to wit, on the 23rd day of December, 1895, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 24th day of December, 1895, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Comes now the said appellant-, by attorney, and files *its* motion to vacate the order overruling the motion for a rehearing herein. Which said motion is in words and figures as follows, viz:

In the Supreme Court of Missouri, in Banc, October Term, 1895.

McCANN & SMIZER, Respondents,
vs.
EDDY & CROSS, Receivers, Appellants.

Motion to Set Aside Order Overruling Motion for Rehearing.

119 Now comes The Missouri, Kansas and Texas Railway Company, in whose name the above-entitled cause has been revived, as the defendant and appellant therein, and moves the court to set aside the order made on December 23rd, 1895, overruling the motion for rehearing heretofore files in this cause and to permit the appellant to file a brief herein, and to have said motion for rehearing submitted upon said brief in support of the same, for the following reasons:

Because the time for filing said motion for rehearing only expired on Thursday, December 19th, while the order overruling the same was made and entered on the morning of Monday, December 23rd, thus leaving only two working days after the expiration of the time for filing the motion until the same was disposed of.

Because the appellant, through its attorney, was preparing and having printed its brief and suggestions in support of the motion for rehearing, and was delayed in filing the same in court by reasons beyond its control.

That prior to the expiration of said Thursday, December 19, the said brief and suggestions were dictated and prepared for the printer, but the printing thereof was not completed on said December 19th; that the appellant's attorney was compelled to leave his office in St. Louis and go to Sedalia to attend business in the circuit court of Pettis county, and arranged to have the proof of said brief forwarded to him at that place; that on account of the recent floods and disarrangement of railroad traffic the said proof failed to arrive at

Sedalia at the time it was expected; that plaintiffs' attorney, completing his business there, returned to St. Louis and found that the proof had already gone to Sedalia, but had been delayed in reaching there, and before leaving Sedalia he left directions for the same to be returned to St. Louis, which was done, and said proof was received in St. Louis on Saturday, when it was read and returned to the printer, but not in time to have the said briefs completed so that they could be forwarded to be filed in the office of the clerk of this court before the court acted upon the motion on the morning of Monday, December 23rd; that had it not been for the un-
120 usual interruption in railroad traffic appellant would have been able to have had said brief printed in time to have forwarded same and had it filed on Saturday, and before the court would have acted upon the motion for rehearing; that the said brief was only finished by the printer on Monday, December 23, and the same is now forwarded to the clerk, together with this motion.

Because, as the appellant fully believes, the authorities cited by appellant in the said brief and the reasons deduced therefrom conclusively establish that the opinion and decision of this case as made by this court in banc is erroneous; that the same is in conflict with the former decisions of this court, as well as of the courts of many other States and of the appellate courts of the United States.

Because the appellant was entitled to be heard in support of its motion for rehearing and it was diligently preparing a brief to be submitted in support of the same, but was unavoidably and without fault on its part deprived of the privilege of filing such brief by the circumstances before mentioned.

Because the appellant when it submitted the case originally relied upon the cases cited in its first brief, viz, the case of Dimmitt *v.* Railway Company, and of Nines *v.* Railway Company, heretofore decided in this court—one case in division No. 1 and the other in division No. 2—as conclusively establishing the construction of section 944 of the Revised Statutes to the effect relied upon by appellant and conceded in the argument by council for respondent to have the same effect; and

Because in submitting the case to the court in banc counsel again relied upon said authorities, and upon the farther fact that division No. 2, by an unanimous opinion in this case, had ruled in the same way, and which was affirmed by the overruling of respondent's motion for rehearing and still no attack was made upon any of those decisions by the respondent; and

Because the position now taken by the court in regard to said statute was first taken and announced in the last opinion filed in this case.

121 Because, under the circumstances just mentioned, the appellant has never had an opportunity to argue the question now presented by the court in its last opinion; and

Because the argument submitted in the brief and suggestions in support of the motion for rehearing is the first presentation that

the appellant has been called upon or had the opportunity to make of its views and contentions upon the new question thus introduced into the case; and

Because the authorities cited and discussed in said last brief show that the conclusions reached in the last opinion in this case are not sustainable upon the rules governing cases of this kind.

Wherefore the appellant, respectfully suggesting to the court that it has committed error in rendering the decision which it has in this case, asks the court to examine the said brief tendered herewith, and, after considering the same, to grant the prayer of this motion, to wit, that the order overruling the motion for rehearing be set aside, and that the said motion be again submitted in connection with the appellant's brief and suggestions in support of the same.

GEO. P. B. JACKSON,
Attorney for Appellant.

And afterwards, to wit, on the 3rd day of March, 1896, the followings proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
M., K. & T. R'Y Co., Appellant.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to vacate the order overruling the motion for rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 31st day of March, 1896, the following proceedings were had in said cause, viz:

122 McCANN & SMIZER, Respondents,
vs.
M., K. & T. R'Y Co., Appellant.

Now, at this day, there is presented to the Honorable Theo. Brace, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to the said respondents, citing and admonishing them to be and appear at a Supreme Court of the United States on the 30th day of April, 1896, and a supersedeas bond in the sum of two thousand dollars; which said writ of error is allowed, said citation signed, and said bond approved and ordered to be filed and made a part of the record herein.

Which said bond is in words and figures as follows, viz:

Know all men by these presents that we, The Missouri, Kansas & Texas Railway Company, as principal, and —— ——, as sureties, are held and firmly bound unto McCann and Smizer, a copartnership composed of William C. McCann and Milton B. Smizer, in the full and just sum of two thousand and no 100 dollars, to be paid to the said The Missouri, Kansas and Texas Railway Company, its successors and assigns; to which payment, well and truly to be made,

we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at the October term, A. D. 1895, of the supreme court of Missouri, in a suit depending in said court between McCann and Smizer, copartners as aforesaid, respondents, and The Missouri, Kansas & Texas Railway Company, appellant, judgment was rendered against the said Missouri, Kansas & Texas Railway Company, and the said Missouri, Kansas & Texas Railway Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said McCann and Smizer, citing and admonishing them to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., not exceeding thirty days from the date of said citation:

123 Now, the condition of the above obligation is such that if the said The Missouri, Kansas & Texas Railway Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

MISSOURI, KANSAS & TEXAS R'Y CO., [SEAL.]
By JAMES HAGERMAN, *Gen. Solicitor.* [SEAL.]
W. NICHOLS. [SEAL.]

Sealed and delivered in presence of—

GEO. P. B. JACKSON.

Approved by—

THEO. BRACE, *C. Justice.*

April 1st, 1896.

And afterwards, to wit, on the 14th day of April, 1896, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
M., K. & T. R'y Co., Appellant.

Now, at this day, comes the said appellant, by attorney, and files its assignment of errors herein.

Which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri. In Vacation.

McCann & Smizer, Defendants in Error,
vs.
Missouri, Kansas & Texas Railway Company, Plaintiff in Error.

Assignment of Errors.

Now comes the above-named defendant (plaintiff in error) and for its assignment of errors says that in the record and proceedings in the above-entitled case there is manifest error, in this:

1. The supreme court of the State of Missouri erred in holding and deciding that sec. 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the Constitution of the United States.

2. The said sec. 944 of the Revised Statutes of the State of
124 Missouri of 1889 is repugnant to and in conflict with the Constitution of the United States for the reason that it attempts to and, if enforced according to its terms and purposes, does regulate commerce between the different States; and the supreme court of the State of Missouri erred in holding that under the effect of said statute the plaintiff in error was liable in this case for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point upon another line of railroad in the State of Illinois.

GEO. P. B. JACKSON,
Attorney for the Plaintiff in Error,
Missouri, Kansas & Texas Railway Company.

State of Missouri, *sct:*

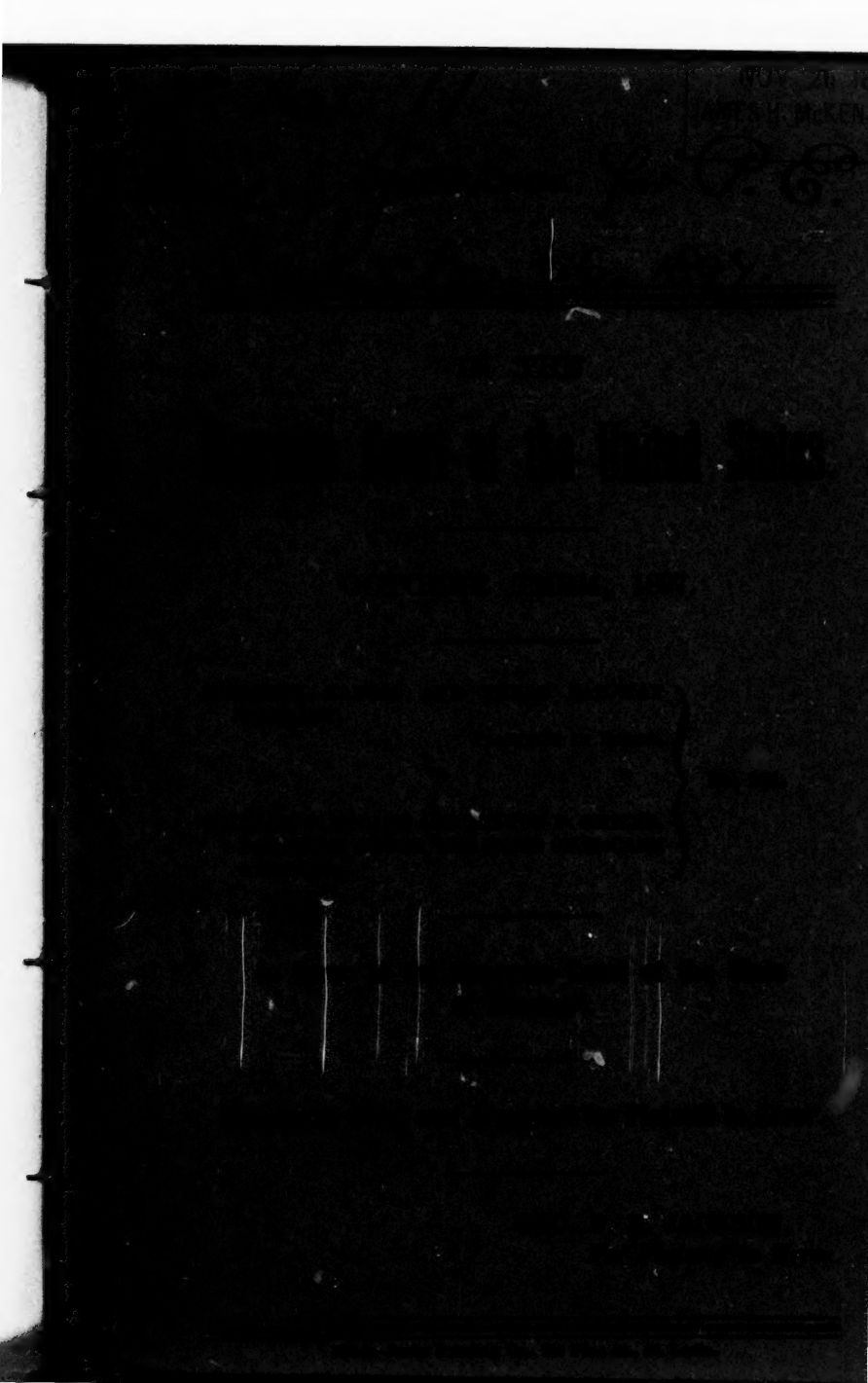
I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of all the record and proceeding- had and made by this court in the above-entitled cause as fully and complete as the same appears of record and on file in this office.

Seal of the Supreme Court of Missouri.

In testimony whereof I have hereunto set my hand, as such clerk, and affixed the seal of said court. Done, at office, in the city of Jefferson, this 16th day of April, A. D. 1896.

JNO. R. GREEN, *Clerk.*

Endorsed on cover: Case No. 16,267. Missouri supreme court. Term No., 161. The Missouri, Kansas and Texas Railway Company, plaintiff in error, *vs.* McCann & Smizer, a copartnership composed of William C. McCann & Milton B. Smizer. Filed April 27, 1896.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM C. McCANN AND MILTON D. SMIZER, PARTNERS UNDER THE NAME OF McCANN & SMIZER.
No. 161.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT.

This is an action commenced in the Circuit Court of Monroe County, Missouri, by McCann & Smizer, as plaintiffs, against George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas Railway, to recover dam-

ages sustained on account of delay in the shipment of ninety-nine head of cattle in November, 1890, from Stoutsville, Missouri, to Union Stock Yards, in the city of Chicago, Illinois, the petition alleging that the delay occurred at or near the city of Chicago (Rec., pp. 5–8).

The receivers answered admitting the receipt of the cattle at Stoutsville, but alleging that the Missouri, Kansas & Texas Railway terminated at Hannibal, in the State of Missouri, and that from that point the cattle were shipped over the Wabash Railroad to Chicago at the direction of the plaintiffs, now defendants in error, and that the shipment was made under a special contract, which provided, among other things, that the liability of the receivers should only be that of forwarders, and not of carriers, beyond the terminus of the Missouri, Kansas & Texas Railway; that they should not be liable for anything except the negligence of their own employees, nor for any loss or damage that occurred on any other railroad or after the cattle had left their road, and that they were not to be liable for anything beyond the line of the Missouri, Kansas & Texas Railway except to protect the through rate of freight named in the contract. The answer farther alleged that the cattle were transported from Stoutsville to Hannibal, the terminus of the Missouri, Kansas & Texas Railway, with great promptness and expedition, and without any delay, and that whatever delay there may have been in the delivery of the cattle at Chicago, occurred after they had left the Missouri, Kansas & Texas Railway, and the receivers were not liable therefor (Rec., pp. 8–10).

To this answer there was a reply which denied that the plaintiffs (McCann & Smizer) executed the contract set up in the answer, and farther pleaded "that said alleged contract, if any, was wholly without any consideration, and void, and contrary to public policy." (Rec., p. 10.)

There was a trial before a jury, which resulted in a verdict and judgment for plaintiffs for the amount sued for (Rec., p. 10).

The evidence introduced upon the trial established that there was no delay while the cattle were being transported over the Missouri, Kansas & Texas Railway, nor while they were in the custody of the defendants, receivers of that road; that the entire delay occurred after the cattle had been transferred to the Wabash Railroad at Hannibal, which was the line selected by the shipper (Rec., p. 21), and principally after they had reached the limits of the city of Chicago.

The written contract of shipment was introduced in evidence (Rec., pp. 25–29).

The parts material to this controversy are the opening paragraph on page 26 of the printed record as follows:—

> "This agreement, made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth: That, whereas, the receivers of the Missouri, Kansas and Texas Railway transport live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof, *as hereinafter provided*, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville Station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union Stock Yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from

Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:"

The fourth paragraph on page 27 of the printed record as follows:—

"4th. That the said second party for the consideration aforesaid, hereby assumes, and releases said first party from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property, from any source; failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any stock, overloading cars, fright of animals, or crowding one upon another or any and all other causes except the negligence of said first party, and said negligence not to be assumed, but to be proved by the said party of the second part."

And the thirteenth paragraph on page 29 of the printed record as follows: —

"13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its

road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas Railway, excepting to protect the through rate of freight named herein."

At the conclusion of the evidence the defendants, receivers, sought to have the jury instructed to the effect that under the evidence the defendants were not liable, and farther that under the contract of shipment read in evidence the defendants were not liable for any damages or delays which occurred on any line of railroad other than the one operated by the defendants, and that if the jury found from the evidence that the defendants transported the plaintiff's cattle from Stoutsville to Hannibal without unreasonable delay, and delivered the cattle to the Wabash Railroad as its connecting carrier within the time usually and reasonably required for such transportation and delivery, then the defendants were not liable in this case notwithstanding the cattle may have been unreasonably delayed on the Wabash Railroad. These instructions were refused by the court (Rec., p. 57).

Plaintiffs asked no instructions, but the court of its own motion instructed the jury to the effect that the defendants were liable for any delays that were occasioned by the Wabash Railroad, or which occurred after the cattle were delivered to that company (Rec., p. 57).

The jury having rendered a verdict against the receivers, they filed a motion for new trial, assigning the errors committed in the giving and refusing of the instructions, and also assigning as error that the verdict and judgment, and the law as declared by the court in the instructions given were contrary to, and in conflict with, the constitution of

the State of Missouri and the constitution of the United States, " and farther that Sec. 944 of the Revised Statutes of Missouri, relied upon by the court, and by the court construed as applying to and controlling the contract of shipment under which plaintiffs' cattle were shipped from Stoutsville, Missouri, to Chicago, Illinois, is contrary to, and in conflict with, the constitution of the State of Missouri and the constitution of the United States."

This motion for new trial was overruled and exceptions saved, and a proper bill of exceptions in due time filed in accordance with the State practice (Rec., pp. 59–61).

The statute referred to in the motion for new trial, and which was relied upon to defeat the provisions of the written contract, and to render the defendant liable for delays occurring after the cattle had been delivered to its connecting carrier, is as follows: —

REVISED STATUTES OF MISSOURI, 1889.

"Sec. 944. *Liabilities of Common Carriers.*—Whenever any property is received by a common carrier to be transferred from one place to another, *within or without this State*, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the

owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

In due time an appeal was prosecuted to the Supreme Court of the State of Missouri, which is composed of two divisions. This case was assigned to Division No. 2, where it was duly submitted at the April Term, 1894. On June 20th, 1894, that division decided the case, reversing the judgment of the court below, and filed an opinion in which all the judges of that division concurred, holding the above statute (Sec. 944), to be unconstitutional for the reason that it conflicted with the constitution of the United States, because plainly a regulation of interstate commerce (Rec., pp. 68–71.)

This opinion should be specially noticed here, because it was wholly ignored in the subsequent proceeding in the Supreme Court. On July 10th, following, the plaintiffs, respondents in the State Supreme Court, and defendants in error here, filed a motion for rehearing (Rec., pp. 72 and 73).

And subsequently, on October 15th, 1894, the court denied the motion for rehearing (Rec., p. 79).

Between the time of the first decision and the overruling of the motion for rehearing Messrs. Eddy and Cross, the receivers, had both died, of which fact the court was in ignorance at the time it denied the motion for rehearing, and the railroad and appurtenant property having been restored to the possession of the Missouri, Kansas & Texas Railway Company under orders of the proper United States Circuit Courts, upon the condition that the railway company should respond in all cases where the receivers were liable, the order overruling the motion for rehearing was set aside and the case was by stipulation revived in the

name of the Missouri, Kansas & Texas Railway Company, which was substituted as the appellant in the Supreme Court of Missouri (Rec., p. 79).

In December following a rehearing was granted, and the case set down for farther rehearing in January, 1895, when it was again argued and submitted in Division No. 2 of the Supreme Court of Missouri. Without rendering any farther decision or opinion in the case, that branch of the court, on July 12th, 1895, ordered the case transferred to the court *in banc*, that being the highest tribunal in the State. At the October Term, 1895, the case was argued and submitted to the court *in banc*, and on December 10th, 1895, a decision was rendered and an opinion filed affirming the judgment of the State Circuit Court. This opinion wholly ignored the previous opinion of Division No. 2, and decided that the contract between the parties must be construed under the effect of the statute, Sec. 944 above quoted, and that by reason of the effect of that statute, the defendant railway company was liable for any delays occasioned by the Wabash Company after the cattle had been delivered to it, and expressly decided that the statute referred to was not in conflict with the constitution of the United States (Rec., pp. 81–86).

The railway company, the present plaintiff in error, filed a motion for rehearing in the Supreme Court of Missouri, which was afterwards denied (Rec., pp. 87–89), and now brings the case here by writ of error, and assigns for error:—

I.

The Superme Court of the State of Missouri erred in holding and deciding that Sec. 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the constitution of the United States.

II.

That said Sec. 944 of the Revised Statutes of the State of Missouri of 1889 is repugnant to, and in conflict with the constitution of the United States for the reason that it attempts to, and if enforced according to its terms and purposes, does regulate commerce between the different States.

III.

The Supreme Court of the State of Missouri erred in holding that, under the effect of said statute the plaintiff in error was liable in this case for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point upon another line of railroad in the State of Illinois.

GEO. P. B. JACKSON,
For Plaintiff in Error.

POINTS AND AUTHORITIES.

I.

In the absence of the statute under consideration, R. S. of Mo. 1889, Section 944, what has been designated as the "American Rule," was in force in the State of Missouri, and under that the carrier, plaintiff in error here, was only to be regarded as a "forwarder" beyond its own line, and not liable for delays which occurred upon a subsequent connecting line, in the absence of a special contract assuming the duties and liabilities of a common carrier beyond its own line. Such was the law as declared by this court, and in most of the States, especially in Missouri.

R. R. *v.* Mfg. Co., 16 Wall. 318–324;
R. R. *v.* Pratt, 22 Wall. 123;
Ins. Co. *v.* R. R., 104 U. S. 146;
Myrick *v.* R. R., 107 U. S. 102;
Coates *v.* Express Co., 45 Mo. 238;
Snider *v.* Express Co., 63 Mo. 376;
Sewing Machine Co. *v.* R. R., 70, Mo. 672;
Dimmitt *v.* R. R., 103 Mo. 433.

See also the opinions filed in this case by the Supreme Court of Missouri.

II.

In order to extend the liability of a carrier beyond its own line it is, barring this statute, necessary to prove a special contract to that effect.

Ray's Negligence of Imposed Duties; Freight Carriers, page 364, and cases cited above.

In the case at bar there was not only no special contract for the extended liability, but a positive and express stipulation that it should not exist.

III.

In the absence of the statute in question, the carrier could lawfully contract against liability for loss or damage occurring on a connecting line or occasioned by the negligence of a connecting carrier.

Cases cited above, and

Hunter *v.* R. R., 42 Am. and Eng. R. R. Cases, 501;
Cent. Trust Co. *v.* R. R., 31 Am. and Eng. R. R. Cases, 103;
Piedmont Mnfg. Co. *v.* R. R., 19 South Car. 353;
Hutchinson on Carriers, Sec. 149b and notes.

Beyond its own line a railroad company is not a common carrier in the strict sense of the term, but is a private carrier for hire,— that is but a bailee for hire, and as such may contract against its own negligence and certainly against that of any other party.

Hutchinson on Carriers, Sec. 40;
Story on Bailments, Secs. 33 and 495;
2 Story on Cont., Sec. 752a and note;
Fish *v.* Ross, 2 Kelley (Geo.) 349;
Griswold *v.* R. R., 90 Iowa, 265;
Stevens *v.* Ry., 109 Cal. 86;
Hartford Ins. Co. *v.* Ry., 70 Fed. 201.

IV.

The entire contract must be construed together; — and so construed it is evident that the parties agreed by the

stipulations of the contract to limit the carrier's liability to its own line.

See first opinion in this case at page 70 of the record.

V.

If a special consideration for the agreement limiting the liability of the carrier is necessary, it can be found in the special rate charged for the shipment. The statement in the contract that the rate was a special one is *prima facie* evidence of that fact, and that the same rate is given to everyone under the same circumstances does not prevent its being a reduced or special rate.

McFadden *v.* R. R., 92 Mo. 343;
Rogan *v.* R. R., 51 Mo. Ap. 665;
Duvenick *v.* R. R., 57 Mo. Ap. 550.

But, as the carrier was not compelled to transport the cattle beyond its own line, no special consideration was necessary to support the clause limiting the liability. That was simply a statement of the nature and extent of the only agreement made concerning transportation beyond the initial line.

VI.

Prior to the last opinion of the Supreme Court of Missouri, in this case the statute in question had received a construction which only gave it the effect of making an unlimited bill of lading *prima facie* evidence of a special contract assuming the duties of a common carrier to the destination of another line,— but still recognizing the right to limit the liability to the carrier's own road.

Dimmitt *v.* R. R., 103 Mo. 433;

Nines *v.* R. R., 107 Mo. 475;
Glass Co. *v.* R. R., 44 Mo. Ap. 416;
Pub. Co. *v.* R. R., 44 Mo. Ap. 421;
Hill *v.* R. R., 46 Mo. Ap. 519.
Original opinion in this case, record, p. 70.

VII.

By the last opinion in this case (record, p. 82), the Supreme Court of Missouri has overturned all the rules previously mentioned, by placing a construction on the statute which forbids the limiting of liability in the manner of the contract in question, and which makes the initial carrier liable for the acts or neglect of a subsequent carrier, regardless of the stipulation to the contrary.

VIII.

The statute as now construed is a regulation of commerce, and as the statute by its terms applies to shipments to points "within or without this State" (Missouri), and in the case at bar is made to control the shipment from a point in Missouri to a point in Illinois,— it is a regulation of commerce among the States.

Hall *v.* DeCuir, 95 U. S. 485;
Leisy *v.* Hardin, 135 U. S. 100;
R. R. *v.* Illinois, 118 U. S. 571;
R. R. *v.* Illinois, 163 U. S. 142.

To the same effect have been the decisions in Missouri.

Stanley *v.* R. R., 100 Mo. 435;
Grimes *v.* Eddy, 126 Mo. 168;
Selvege *v.* R. R., 135 Mo. 163, and see original opinion in this case, and cases there cited (record, p. 71).

Because it is a regulation of interstate commerce the statute in question,— section 944, of the Revised Statutes of Missouri 1889, — is in conflict with section 8 of article 1 of the constitution of the United States, and is therefore void.

Cases cited above.

GEO. P. B. JACKSON,
For Plaintiff in Error.

ARGUMENT.

This case is brought to this court upon a writ of error to the Supreme Court of the State of Missouri for the purpose of reviewing a decision of the latter court sustaining the validity of a law of that State, which was attacked as being in violation of that clause of Sec. 8 of Article I of the constitution of the United States, which confers upon Congress the power to regulate commerce among the several States.

The law of the State of Missouri thus brought under criticism is an enactment concerning common carriers found in the Revised Statutes of Missouri, 1889, Chap. 26, Sec. 944, which reads as follows: —

> "Sec. 944. *Liabilities of Common Carriers.*— Whenever any property is received by a common carrier to be transferred from one place to another, *within or without this State*, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common

carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

The question arose in this case in the following manner: The original defendants, Messrs. Eddy and Cross, were the receivers of the Missouri, Kansas & Texas Railway, a line extending through the State of Missouri, and having its northern terminus at Hannibal, Missouri, on the Mississippi river. The plaintiffs, a partnership under the name of McCann & Smizer, shipped a lot of cattle from Stoutsville, a station on the Missouri, Kansas & Texas Railway, in Missouri, consigned to a commission firm at the Union Stock Yards in the city of Chicago, Illinois. The cattle could only be transported a short distance over the defendant's road, that is from Stoutsville to Hannibal, where they had to be transferred to some other line to be carried to Chicago. The shippers (defendants in error here) selected the Wabash Railroad as the connecting line to which the Missouri, Kansas & Texas road was to deliver the cattle at Hannibal for transportation to Chicago. It was conceded at the trial that there was no delay on the Missouri, Kansas & Texas Railway, and that the delay which caused the loss of which complaint was made all occurred on the Wabash Railroad while the cattle were in its custody. It is not necessary to refer to the evidence of one of the original plaintiffs by whom this was shown. It is sufficient that in both opinions filed by the Supreme Court of the State this question was taken as settled.

In the first opinion, at page 68, the court said:—

"Action to recover damages based on delay in the shipment of a lot of cattle from Stoutsville, in Monroe County, Missouri, to Chicago, in Illinois.

"The delay complained of occurred in the latter State, and on a connecting road."

In the last opinion filed in the case (Rec., p. 82) the court makes the following statement:—

"This action is to recover damages against defendants as receivers of the Missouri, Kansas & Texas Railway for negligent duty in the transportation and delivery of 95 head of cattle from Stoutsville, in Monroe County, in this State, to Chicago, in the State of Illinois.

"Stoutsville is a station of the road operated by defendants. Hannibal is the eastern terminus of their road. From that road the Wabash Railway Company operates a road to Chicago. The cattle were delivered by defendants to the Wabash Company in a reasonable time, and in good order, by which they were carried to Chicago. The negligence complained of was committed on the Wabash road, and by its employees."

The shipment was made upon a written bill of lading, or, as it was styled, "Live Stock Contract," which was introduced in evidence upon the trial. It contained a number of provisions not material to this case. It appears at length in the record at pages 25 to 30. The parts material here are the opening paragraph and the subsequent ones marked 4 and 13, which are set forth in the statement at pages , *ante*.

In the Circuit Court, where the case was brought, plaintiffs recovered judgment for the amount sued for, and the receivers of the railway company appealed, and, because of the constitutional question involved, the appeal was taken to the Supreme Court of the State, which is composed of two divisions. Except for this constitutional

question that court would not have had jurisdiction of the appeal. The case was assigned to Division 2, where, in due time, a decision was rendered, and an opinion filed reversing the judgment of the lower court, because the statute above mentioned was unconstitutional (see Transcript of Record, pp. 68–71).

Subsequently the respondents in that court (defendants in error here) filed a motion for rehearing, which was overruled. Prior to the overruling of the motion, however, both of the receivers had died, which fact was at the time unknown to the Supreme Court of the State. In the meantime also, by orders of the proper courts, the railroad had been restored to the possession of the Missouri, Kansas & Texas Railway Company. A stipulation was filed suggesting the death of the receivers (former appellants) and providing for the substitution of the Missouri, Kansas & Texas Railway Company as defendant and appellant in place of the receivers. Thereupon the court made an order setting aside the overruling of the motion for rehearing and reviving the cause in the name of the Missouri, Kansas & Texas Railway Company. For convenience, we will treat the case as though the Missouri, Kansas & Texas Railway Company had all the time been the party upon that side. Some months later Division 2 of the Supreme Court granted a rehearing, and the case was again argued, but, without any farther decision, it was transferred to the court *in banc*, composed of the two divisions, and which is the court of last resort in the State. The case was finally decided by the court *in banc* sustaining the judgment of the lower court and holding the statute to be valid, on the ground that it was not a regulation of interstate commerce, and not in conflict with the constitution of the United States (see the last opinion, Transcript of Record, pp. 81–86).

In order to appreciate the effect of the statute of Missouri as construed and applied by the Supreme Court of

the State, it is well to inquire as to the state of the law and the rights of the parties independently of the operation of this statute.

In the absence of the statute, what has been designated as "the American rule" was in force in Missouri, and, under that, the common carrier (plaintiff in error here), was only to be regarded as a "forwarder" beyond its own line and not liable for the delays which occurred upon the Wabash Railway,— at least in the absence of any special contract by the plaintiff in error assuming the duties and liabilities of a common carrier beyond its own line. This is conclusively settled by the cases cited under Point I of the brief. In connection with that rule of law it was held that a carrier had the power to contract for carriage beyond its own line, and to impose upon itself all the duties and liabilities of a common carrier, even upon the line of another road, but such increased responsibilities and extended duties were not to arise out of mere surmises nor to be inferred from loose statements, but must be clearly established. As a corollary of these propositions the courts asserted and maintained the right of a carrier to restrict such liability to its own line, even though the bill of lading provided for transportation over a connecting line.

The subject is fully discussed in Ray's Negligence of Imposed Duties — Freight Carriers, Chap. 13, beginning at page 364, where numerous cases are cited. Among other things that author says:—

> "In the absence of a special contract a common carrier's liability for goods ends with delivery to a connecting line. * * * The rule of law is well settled in most of the courts that although a railroad corporation may contract to carry beyond its own line, yet it requires an express contract to so bind it."

"Generally a common carrier is not liable for losses sustained beyond the terminus of its own road, unless it has assumed such liability by express contract, or some arrangement in the nature of a partnership exists between it and the connecting carriers. Any imposed obligation of a carrier to the public is limited by the termini of its own route. There is no common-law liability devolving upon any carrier to transport goods over other than its own lines. The liability of a railroad company for the safe carriage of goods beyond the terminus of its own line depends upon its special contracts, express or implied; in the absence of special contract, a railroad company receiving goods for transportation beyond its own line is liable only to the extent of its own road, and for the safe storage and delivery to the next carriers."

In Myrick *v.* R. R., 107 U. S. 102, this court said: —

"A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line,— the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a

special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in Railroad Company *v.* Manufacturing Company, 'It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction.' 16 Wall. 318, 324.

"This doctrine was approved in the subsequent case of Railway Company *v.* Pratt, although the contract there was to carry through the whole route. 22 Wall. 123. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See also Insurance Company *v.* Railroad Company, 104 U. S. 146.

"The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the State courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language but only from clear and satisfactory evidence."

In harmony with the above, the Supreme Court of the State of Missouri, in Coates *v.* Express Co., 45 Mo. 238,

and in Snider *v.* Express Co., 63 Mo. 376, held that, although a bill of lading issued by one carrier provided for transportation over the line of another carrier yet, as to such other line, the issuing carrier was to be regarded simply as a forwarder.

In the case of Sewing Mach. Co. *v.* R. R., 70 Mo. 672, the Supreme Court of the State of Missouri said:—

> "That a railroad may, by contract, subject itself to the obligation of a common carrier beyond its own line, is well settled by the weight of authority, but as was said in R. R. *v.* Pratt, 22 Wall. 124, the result of American authorities, limits the carrier's liability as such to his own line, when no special contract is made. In Perkins *v.* P. S. & P. R. R. Co., 47 Me. 593, it was held that 'a railroad may be bound by special contract, *but not otherwise*, to transport persons or property beyond the line of its own road.' This remark was criticised in Lock Co. *v.* Railroad, 48 N. H. 355, in which we think it was shown 'that the term 'express contract' could hardly have been used in its strict sense, to signify a contract in the form of a direct promise or undertaking, in language, oral or written, proper to show a positive agreement, since the judge who delivered the opinion of the court speaks of a case where the carriers would be liable on the ground that they held themselves out as common carriers to that place; in which case (remarks the judge in the New Hampshire case), as I understand it, the contract would not be express in the strict or usual sense of the term, but implied from the conduct of the party.' Taking the criticism as just, the doctrine may be stated, that a railroad company *may be bound by contract, express or implied, but not otherwise*, to transport persons or property beyond the line of its

own road. As thus declared, it is fully sustained by the authorities, both in the United States and England.''

This was the state of the law in Missouri at the time of the enactment of the statute in question. Subsequently, the question of the validity of the statute arose in the State Supreme Court in the case of Dimmitt *v.* R. R., reported in 103 Mo. 433. There the law was attacked as being a regulation of the interstate commerce, just as it is in the case at bar. In order to avoid that effect, the court gave a certain construction to the statute which will be mentioned hereafter. As relating to the state of the law, however, the court in that case, at page 442, stated the law at the time of the enactment of the statute to be as above, and the same view was expressed in subsequent cases approving the construction given to the statute in the Dimmitt case, which cases will be found under Point VI. of the brief herein.

The same view as to the former state of the law in Missouri is clearly expressed in both the opinions filed in the case at bar, as set forth at length in the Transcript of Record.

In the first opinion in this case the court, in speaking of a former recent decision of that court, by which the statute was so construed as to save it from the charge of unconstitutionality, said :—

> "It has been ruled in Dimmitt *v.* R. R., 103 Mo. 433, under the provisions of the quoted section (then Sec. 598) that it was competent for a common carrier by specific agreement to agree to carry the property only to the terminus of its own line, or what is equivalent thereto, by similar agreement to limit its liability to loss or damage occurring on its own line. This ruling was followed in Nines *v.* R. R., 107 Mo. 475.
>
> "In a similar case, Snyder *v.* Express Co., 63 Mo.

376, before the enactment of the statute in question a similar ruling was made." (Trans. of Record, p. 70.)

In the last opinion in the case, which is now complained of, the court restricted the construction given to the statute in the Dimmitt case, as only authorizing a limitation upon liability by simply contracting to carry to the end of the particular line, and holding that the statute prohibited a limitation upon the liability when the carriage provided for extended beyond the line of the first carrier.

In comparing this position with the former state of the law, the court said, concerning the Dimmitt case:—

> "In that case it was held that that general effect of the statute, and its evident purpose was to apply to common carriers the English rule of duty and liability in respect to the carriage of property beyond their own route as distinguished from the American rule which was at the time recognized as the law of this State. * * * This ruling was in accord with the decisions of the English courts, but under the law as it existed in Missouri prior to the statute, upon the facts shown to have existed, the receiving company would not have been liable for the loss. There is no doubt the statute by its very terms has the effect of applying the English rule so far as it makes the receiving carrier responsible for the defaults of other carriers through whose agencies it undertakes to complete the contract of carriage. This is as far as the decision in the Dimmitt case goes." (Transcript of Record, p. 84.)

Then, after farther quotation from the Dimmitt case, the court proceeds in the opinion: —

> "The provision of the statute is that 'wherever

property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes, the right of the carrier to limit its *contract of carriage* to the end of its own route, and there deliver the property to the connecting carrier.

"There can be no doubt then that under the statute, as well as under the English law, the carrier can by contract limit his duty and obligation to *carriage* over its own route.

"But it seems that under the decisions of the English courts, a carrier can also limit his liability to a loss or damages occurring on his own route by specific agreement that it should only be so liable.

"In the Dimmitt case the rule is stated to the full extent, though unnecessary to the decision in that case, there having been no attempt to make such limitation. * * * The dictum of the court in the Dimmitt case to the effect that an agreement that a carrier should only be liable for loss or damage occurring own its on line is equivalent to an express contract to carry the property only to the terminus of its own line, cannot be taken as the law of this case where there is an express contract and also an agreement for non-liability. * * * We cannot therefore give such an interpretation to the statute as would permit a carrier to contract for a through shipment and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would, in effect, operate as a repeal of the vital provisions of the law *which declares a conclusive liability in such case.*

"The statute does not undertake to change the law in respect to liability of carrier for his own negligence, but to extend it to connecting carriers as well and

declare liability for negligence without regard to which was in fault.

Under these views of the law no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. *The statute forbids such qualification of the contract.*" (Transcript of Record, pp. 85 and 86.)

There is no difficulty therefore in reaching the conclusion that, but for the statute in question, the courts of Missouri would have held that it was competent for the plaintiff in error to have limited the liability in the manner attempted in the contract in question. The theory of the court in fixing the liability upon the defendant is plain. It is that there was a contract for through carriage which in the opinion of that court, must be regarded as unlimited by the thirteenth paragraph of the contract. In order to reach the conclusion which it did the court held that the contract for carriage from Stoutsville to Chicago was "absolute and unconditional." This interpretation of the contract could only be reached by ignoring the limitation of the thirteenth paragraph, and that was accomplished by ignoring it under the force of the statute which, as the court says, forbids such qualification, because the effect of that qualification would have been "a repeal of the vital provisions of the law which declares a conclusive liability in such case." We must not be misconstrued into attempting to put the Supreme Court of Missouri in the attitude of holding that a carrier can be compelled to accept property for transportation beyond its own line.

That it cannot, the court concedes. But the announcement is made that when property is received for transportation to a point beyond the carrier's line, then the absolute liability of a common carrier to the destination attaches, *by force of the statute*, and all attempts to limit the liability, as might formerly have been done, are rendered nugatory by operation of the statute.

Much weight has heretofore been given in this case to the contention that the attempt to limit the liability in this contract must fail because there was no sufficient consideration for it. While that is not made a prominent feature in the opinion of the court, yet it will probably be urged by counsel, as it has been heretofore. Briefly upon that question, I submit, first, that a reduced rate is a sufficient consideration for the making of any agreement which is not against public policy, and that under the law in Missouri, the recital in the contract that the rate charged is a special one is *prima facie* evidence of that fact, and that the circumstance that a similar rate is given to other shippers under like circumstances does not destroy the character of the rate as a special or a reduced one. Therefore, under the recital in this contract, there appeared to be a sufficient consideration if one was needed (92 Mo. 343; 51 Mo. App. 665; 57 Mo. App. 550).

But a second answer to this contention is that no special consideration was needed. An examination of the contract will show that there were a number of stipulations which were by their terms made to depend upon the consideration of a special rate. Among others was the fourth paragraph, which has been wholly ignored by the court below, releasing the carrier from all liability except for its own negligence. But when we come to the thirteenth paragraph, which is the most essential one in this controversy, we find that it is so constructed as to indicate an entire independence of the mere matter of special rate. It finds

its support, so far as consideration is concerned, in all the stipulations and in the mutual agreements of the parties. It rests upon the opening paragraph of the contract, which says: "Now, therefore, for the consideration and mutual covenants and conditions herein contained." This thirteenth paragraph is not to be construed as a special provision depending upon some special consideration. It is a statement of the extent of the duty and obligation assumed by the carrier. It is an expression adopted to set forth just what the agreement between the parties was. The contract in the opening paragraph provided that the carrier was to transport the live stock described "*as hereinafter provided*" from Stoutsville, Missouri, to Chicago, Illinois. Certainly the words "as hereinafter provided" referred to something else to be subsequently set forth in the contract as explaining and limiting the transportation previously mentioned. The transportation "as hereinafter provided" was, by the terms and within the limits of this contract, to be a carriage with the unconditional liability of a common carrier to the terminus of the carrier's line, and with a limitation against such liability beyond that line. As the carrier had the right to stipulate that it would carry only to the end of its line, so it had the right to say upon what conditions it would carry beyond its line, and this was all that this contract undertook to do. As there was no common law duty, and no statutory duty upon it to carry beyond its own line, it could undertake such extended transportation or not, just as it pleased, and as it had the right to refuse altogether, so it had the right to impose such limitations as the other party would agree to. Unless therefore it be said that it was against public policy, or that it was prohibited by some statute, the limitation in the thirteenth paragraph should be given full effect without regard to the question of a special consideration to support it.

The contention has also been made that a carrier cannot limit its liability beyond its own line in a contract providing for through transportation, because, to do so, would be to contract against its own negligence. Counsel for defendants in error have contended that, even regardless of the statute, such was the effect of the contract in this case. The court, however, reached the conclusion that the limitation attempted by the thirteenth paragraph became a limitation of liability against the carrier's negligence, only because the statute made the carrier liable for the negligence of the connecting line. The proposition involved as the basis of both of these conclusions, whether depending upon the statute or not, is that there was an "absolute and unconditional" contract for through carriage, and that that having been made, no limitation could be placed upon it. According to the method of reasoning heretofore adopted by counsel upon the other side, there was a complete contract in the first paragraph for carriage from Stoutsville, Missouri, to Chicago, Illinois. Of course there is no contention that the plaintiff in error could not have made such a special contract, and if there had been no limitation or qualification, it would have been subject to all the liabilities of a common carrier throughout the entire distance. It is well settled, however, that, in order to impose upon the initial line the liability of a common carrier beyond the terminus of its own road, there must be a special contract either express or implied to that effect.

This was distinctly announced as the rule in Missouri in the case of Sewing Machine Co. *v.* R. R., 70 Mo. 672, where it is said: —

> "The doctrine may be stated that a railroad company may be bound by contract, express or implied,

but not otherwise, to transport persons or property beyond the line of its own road."

Since there must be this special contract, it may be made upon such terms and conditions as the parties agree upon, and that is to be ascertained, not from reading a single paragraph of the contract between the parties, but by taking the whole of it and construing all its parts together. When we read the contract here in question we find that the first stipulation was that, for a rate of freight specified, the plaintiff in error, whose railroad terminated at Hannibal on the State line of Missouri, contracted to carry the cattle in question from Stoutsville, Mo., to Chicago, Illinois, "as hereinafter provided." Even without the use of these words just quoted, this opening paragraph must be considered in connection with what follows, but, when it is specifically stated that this extended transportation was to be performed in the manner subsequently specified in the contract, attention is specially directed to the future stipulations. In the fourth paragraph it is provided that there is a release from liability from everything except the negligence of the party of the first part, that is the plaintiff in error, and then farther in the thirteenth paragraph the nature of the undertaking of the plaintiff in error is particularly set forth, and it is to the effect that it is not to be responsible for any loss or damage occurring beyond its own line. It cannot be said that there was a complete contract for through transportation which imposed the duties and liabilities of a common carrier, and that by some subsequent independent contract an effort was made to limit the liabilities assumed by the former one, because there was no contract for carriage at all until the agreement was made that there should be no liability beyond the initial line. It manifestly was not the intention of the parties to make such a

contract as imposed upon the initial carrier liability throughout the entire distance. At the same time that the parties signed the stipulation for transportation from Stoutsville to Chicago they signed the other stipulation limiting the liability to the initial line. When they executed one part of the contract they executed every part, and all became effective at the same instant. Hence, there was no " absolute and unconditional " contract for through carriage, either in the intention of the parties or in the form of the instrument adopted to express that intention. Any effort to so construe the contract independently of the statute in question must fail. In fact the Supreme Court of Missouri, in its last opinion, repudiated such a construction of the contract, but reached its conclusion solely by reason of the construction which it puts upon the statute.

In this last opinion the court says :—

> " We cannot, therefore, give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would in effect operate as a repeal of the vital provisions of the law, which declares a conclusive liability in such case. The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and declare a liability for negligence without regard to which was in fault. Under these views of the law, no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to relieve itself

from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. *The statute forbids such qualification of the contract.*"

Thus it is that the statute is so construed as to render the contract for through carriage absolute and unconditional, and to nullify the attempt to limit the liability.

If it were not as the court said, that "the statute forbids such qualification of the contract," there can be no reasonable question but that the carrier might limit its liability by such a stipulation as that contained in the thirteenth paragraph.

It has been suggested that such a stipulation following a previous stipulation for through transportation is against public policy.

And the court possibly had some such idea in connection with the effect of the statute, for it is said:—

> "The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and to declare a liability for negligence without regard to which was in fault."

This proposition, however, that the limitation upon the liability is against public policy, must be regarded with reference to the difference between the duty of a common carrier to transport over its own line and over the line of another carrier.

In the first case, it acts under the compulsion of the general law which compels a carrier to receive, transport and safely deliver the goods tendered to it. In the latter case, there is no such law governing its actions. It is as free to contract in regard to transportation over some other

line as any individual is to contract in regard to his personal services or concerning his individual property. The very reason which is given why a carrier cannot contract against its own negligence is that the law imposes upon it a duty to the public. Therefore it cannot by contract remove these obligations. The character of a common carrier the law stamps upon it and it cannot change it or abandon it by any contract it may enter into. As is aptly stated in the syllabus to Railroad *v.* Lockwood, 22 Wallace, 328:—

> "A common carrier does not drop his character as such merely by entering into a contract for limiting his responsibility."

Even if it made a contract that it would not be liable for its own negligence, it does not cease to be a common carrier. Therefore, the law continues to hold it responsible for its negligence despite its contract. When, however, we pass from its own line, we are confronted with different conditions; we are no longer dealing with a party resting under onerous duties imposed by the law. It is freed from these severe obligations and heavy penalties,—so onerous and severe that the courts have all said that the law does not impose them upon a carrier beyond its own line. Therefore, all the liabilities that can be claimed to exist against a party by reason of a proposed carriage beyond its own line are such and such only as it agrees to assume. It may assume them if it will, but if it does so it is the result of a special contract.

In the opinion originally filed in this case is the following language:—

> "In the case at bar, the instrument which is the basis of this action is to be construed as a whole.

> Construing it in this way, it is easy to see that the liability apparently assumed by the first clause of the contract is expressly qualified and limited by the thirteenth specific agreement aforesaid, which in clear and unambiguous terms confines the liability of the defendant company to its own line of road."

The statement there made is in harmony with the almost uniform expressions of the courts and is a more logical view of the case than that taken in the last opinion.

Among many cases to the same effect I cite the following:—

> Hunter *v.* Ry., 42 Am. & Eng. Ry. Cases, 502;
> Cent. Trust Co. *v.* R. R., 31 Am. & Eng. Ry. Cases, 103;
> Piedmont Mnfg. Co. *v.* R. R., 16 Am. & Eng. Ry. Cases, 194 (19 South Car. 353);
> Hutchinson on Carriers, Chap. V. generally, and specially section 149b, and notes.

The case of Piedmont Mfg. Co. *v.* Railroad, *supra*, contains an exhaustive discussion of the question under consideration, with a result directly opposed to that announced in the last opinion in this case. There the court construed the contract of shipment in question to be one for a through shipment in one clause, as may be said of the one now under consideration, but by reason of a clause limiting the liability to the carrier's own line, the court held that the issuing carrier could not be held on account of the negligence of a connecting carrier through whom the transportation was to be completed. I especially ask the attention of the court to the reasoning of this case and to the distinction that is drawn between the duties and liabilities of a com-

mon carrier upon its own line arising from public law, and the liability of the same carrier on account of negligence occurring upon a connecting line, which would arise entirely out of contract. Unless the reasoning of that case can be overthrown, it is decisive of the case at bar, for the analogy could not be stronger.

Mr. Hutchinson, in his work on Carriers, at section 149b, uses this language:—

> "The liability of the carrier beyond the terminus of his own route being thus a matter of contract, it is clear that he may prevent all question as to his liability by an express contract excluding it, and that such a contract will be enforced even in those States where the rule of Muschamp's case prevails. Such a contract is not opposed to public policy nor void as an effort to relieve the carrier of his common law liability for negligence. Limitations of this nature are found in nearly all of the modern contracts of carriers, and will prevail under the same circumstances that any other contract would be enforced."

See also Ray's Negligence of Imposed Duties, Freight Carriers, Chap. XIII.

The fact that the transportation beyond the carrier's own line does not result from the operation of any general rule of public law, the fact that he is not required against his will to undertake the transportation beyond his line shows that he is not a common carrier in the strict sense of the term. The test that is laid down to distinguish between a common carrier and a private carrier for hire is that the latter may undertake the transportation or not as he desires. This is the privilege of a carrier beyond his own line and establishes his relation to such a transaction as

that of a private carrier for hire. The private carrier for hire is but a bailee for hire and as such is only liable for negligence; that is, for failing to exercise that degree of diligence which is required of him. If he is not negligent he cannot be liable, and yet it is well settled that the bailee for hire may contract against such liability even to the extent of removing it entirely.

Hutchinson on Carriers, Section 40;
Story on Bailments, Sections 33 and 495;
2d Story on Contracts, Sec. 752a, and note, and especially the case of Fish *v.* Ross, fully abstracted therein.

These authorities are consistent with our general understanding upon such questions. It is not correct to say that in no case can a party contract against his negligence. It is only where to do so would change or abandon the character which some particular vocation gives to him under the general law. If a duty is imposed upon a party by public law to do a certain thing in a certain way, then it is against the policy of the law to permit him to so contract as to avoid that duty, but where an obligation may be assumed or not as the party elects, and if assumed at all is done by a special contract, there the party may put a limitation upon his liability. By doing so, he does not attempt to countervail the policy of any public law. As illustrations see: —

Griswold *v.* Railroad Company (Iowa), 57 N. W. 843;
Stevens *v.* Ry. (California), 41 Pac. 787;
Hartford Ins. Co. *v.* Ry., 70th Federal, 201.

In all of these cases, it is held that a railway company in leasing a portion of its right of way may contract against its liability for damage arising from the destruction of buildings occasioned by its own negligence. The reasoning

of these cases makes them especially applicable to the matter we have in hand. In the last case, Judge Sanborn, after having referred to various cases which held that a railway company cannot contract against liability for its negligence in operating its road, and after pointing out the analogy in many respects between such cases and the one under consideration, adds:—

> "But the analogy fails in that vital part which constitutes the reason and foundation of the rule established by the authorities cited. Its fallacy is, that the law imposes upon a railroad company the absolute duty to operate its railroad, to employ suitable men to operate it, to exercise ordinary care to furnish them with a reasonably safe place in which to render their services, and with reasonably safe appliances and machinery with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interests, because it endangers the lives and limbs of citizens, which are of the highest value to the State and nation. A contract which exempts the carrier from negligence in the discharge of these duties is void because it relieves it of an absolute duty which the law imposes upon it and because it unreasonably endangers the lives of employees and passengers. But the law imposes no duty upon a railroad company to lease its right of way or to use ordinary care not to set out fires that would burn property placed upon it by strangers without permission. In the former case public policy and the law imposed upon the carrier the duty to hire employees to operate its railroad with reasonable care in order to protect its employees from injury and therefore it may not contract to be relieved from the law and the duty.

The carrier has no choice. It must perform these duties or forfeit its charter. In the latter case no duty to lease is imposed. The company has the option,— the choice,— to lease or refuse to lease; and if it does lease and does stipulate for indemnity from damages caused by its negligence in firing the property of the lessee placed upon the leased premises by its permission that contract in no way relieves it from the discharge of any duty to the public or to any citizen that the law or public policy had imposed upon it.

"Again, the law imposes upon a railroad company the absolute duty to accept passengers and freight when offered and to carry the former with the utmost and the latter with ordinary care. The passenger is often obliged to travel and the shipper to send his goods by railroad. In making their contracts, they do not stand on an equal footing with it. They cannot stop to negotiate and decide upon the terms of a contract every time they desire to use the railroad. They would often prefer the abandonment of the contract to such negotiations. On the other hand the railroad company with its trained employees and its monopoly of the transportation facilities sought has the ability and the power to exact the contract it desires. This inequality in the situation of the parties which would, if permitted, enable the railroad company to obtain unfair contracts from shippers, and the fact that contracts with them which exempt the company from liability for negligence relieve it from an absolute duty imposed by the law, and thus violate it, and at the same time increase the danger to the lives and the property of the people from the operation of a railroad, constitute the reasons for the decisions that have established and maintained the rule that such contracts are against public policy."

In the case at bar it is just as correct to say that the defendant had an option concerning the carriage beyond its line as it was to say, in the case last cited, that the company had an option concerning the lease. As it there had the choice to lease or refuse to lease, so in the case at bar the defendant had the right to transport or to refuse to transport beyond its own line. The law imposes no more obligation to do a particular thing in one case than it did in the other. It was no more the result of the policy of the law concerning the defendant's duty upon its own line that it should enter into a contract to carry beyond that line, than it was that it should make a lease of a part of its right of way. Without protracting this discussion farther, I rest in confidence that the court must agree that the carrier had the right to insert in the contract, seemingly providing at the outset for through importation, the clause limiting liability to loss or damage on its own line, and that, as was said in the Dimmitt case, to have done so was equivalent to having limited the carriage to its own line. Or, what is perhaps the more correct statement of the proposition, that notwithstanding the language calling for transportation from Stoutsville to Chicago, the subsequent stipulation limiting the liability to loss or damage upon the carrier's own line prevented the contract being construed as one for a through shipment and precluded the construction from which it might be said that the Wabash Railway was the agent of the initial carrier for the purpose of completing the transportation. This must be the result unless the statute accomplishes a different result. That it has that effect is really what the court has decided in this case, although it is done with a manifest desire to avoid a repudiation of the Dimmitt case.

The only thing that the liability of the plaintiff in error for the delay on the Wabash Railroad can stand upon is that

such is the effect of the statute, and upon that ground alone the State court was in the end forced to stand.

Such construction of the statute had been acquiesced in for some time (46 Mo. Ap. 521), until it was attacked as being unconstitutional in the Dimmitt case, 103 Mo. 433. To save the law from that attack the court then held that the statute only made the receiving for through carriage *prima facie* evidence of a contract therefor, but that the carrier might still restrict its liability by a stipulation for carriage only to the end of its line, or by limiting the liability to its own line, as was done in the case at bar.

That construction of the statute was followed in a number of cases (see Point VI of the brief), and was regarded as the law of Missouri until the last opinion in the case at bar.

That opinion completely overthrows the reasoning in the Dimmitt and subsequent cases, and renders meaningless the reasons which were given to sustain the constitutionality of the law.

It will be noted that the language of the statute is not that the receiving carrier shall be converted into and regarded as a common carrier throughout the entire distance, but simply that it shall be liable for the negligence of the connecting carrier. The very terms of the statute contemplate the agencies of two distinct carriers, but renders the first liable for the negligence of the succeeding one. When this statute was attacked because it arbitrarily imposed burdens upon carriers, the Missouri Supreme Court said in the Dimmitt case, that it was not the intention of the statute to do that, but only to change the rule of evidence, as it theretofore existed in that State and generally in the other States, by adopting the English rule as to the evidential effect of certain things.

In that case the court said:—

"It is suggested in the brief of counsel for appel-

lant that this statute is violative of some constitutional provisions, under a construction which would render the defendant liable in this case. In order to determine whether it is obnoxious to any constitutional inhibitions, State or national, it becomes necessary first to ascertain its true scope and meaning. At the time of its enactment, the law was as well settled as now that a common carrier may *contract* to carry to a place beyond the terminus of his route and thereby render himself liable as such for the whole distance, but that he is not *required* by law to transport beyond his own line, and, therefore, may stipulate that he shall not be liable except for such loss or damage as may occur on his own route.

"While there was a universal consensus of opinion upon these propositions, there was a diversity of opinion as to what should be evidence of a contract for through carriage when no special contract was made; the English and the courts of some of the States holding that 'where a common carrier takes into his care a parcel directed to a particular place and does not, by positive agreement, limit his responsibility to a part only of the distance, it is *prima facie* evidence of an undertaking on his part to carry that parcel to the place to which it is directed,' although such place was beyond the terminus of his own route."

The law before the adoption of this statute, as well as now, as I have already shown, was that the carrier could only become liable for transportation and its consequences beyond its own line by making a special contract to that effect. The effect of the Dimmitt case is that entering into a contract upon the subject of transportation beyond its own line without limitation upon the liability is made *prima facie* evidence of such special contract as makes the party

a carrier throughout the entire distance. This whole subject is really to be regarded with reference to the effect of this *prima facie* evidence, unless we entirely repudiate the construction given to this statute in the Dimmitt and other cases.

When we find that the statute does not dealwith the question of limiting liability, and does not attempt to prohibit it, but simply in its terms imposes upon the first carrier, liability for the negligence of other carriers, and when we find that the Missouri court construes the language of the statute to mean that the act of a carrier in receiving goods to be transported to a place beyond its own terminus is *prima facie* evidence of an undertaking on its part to carry to the destination, and that such contract as that of which we thus have *prima facie* evidence must be a special one, and that the duties and obligations of a carrier can not otherwise be imposed beyond the carrier's own line, then all we have to inquire farther is whether or not there is any fact overcoming this *prima facie* evidence. As the court said farther in the Dimmitt case,—

> "This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, *or, what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line.*"

This qualification is repudiated in the last opinion in the case at bar, as being mere dictum. Now the court holds that there can be no limitation of the liability to the loss occurring on the carrier's own line because, "the statute forbids such qualification of the contract," and because "such an interpretation would in effect, operate as a

repeal of the vital provisions of the law which declares a conclusive liability in such case."

Because of this new construction of the statute, not only does the *prima facie* evidence of an undertaking for through carriage arise where a parcel is received directed to a particular place, as held in the Dimmitt case, but the statute goes farther and "declares conclusive liability in such case," and forbids a qualification of such contract limiting liability to the initial line.

Thus it is decided that the purpose and effect of the statute was such as to forbid the initial carrier to relieve itself from responsibility for the negligence of a connecting carrier.

If this is correct, it restores all the severity which that court formerly eliminated from the statute in order to sustain its validity, and we are thus brought again to face the question of the constitutionality of this law. The court evidently fully appreciated this position, because in the concluding portion of the opinion it undertook to justify the statute by holding that it was not obnoxious to the criticism that it was unconstitutional under that provision of the Federal constitution which reserves to Congress the right to regulate commerce between the States. In reaching the conclusion that this law was constitutional, the court again assumed the very point that is in issue, i. e., that the defendant had made the Wabash Railroad its agent to complete the transportation. If this is not correct, as I think I have shown it is not, then the statute stands under the present construction as one arbitrarily imposing upon the initial carrier responsibility for the negligence of succeeding carriers.

It must be conceded that, while the Dimmitt case did not say so in terms, yet it was a practical admission that unless the court had adopted the construction which it did, the law would have been held void. In Texas a very sim-

ilar statute was upheld by the court's construing it to apply only to shipments within the State, thus conceding that if it had applied to interstate shipments, it would have been void.

> Sherwood *v.* R. R., 84 Tex. 125 (19 S. W. Rep. 455).

The statute is a regulation of commerce, because it prescribes a new rule for the government of persons engaged in the business of transportating goods from one place to another, and it certainly applies to and affects interstate commerce because, by its terms, the statute is made to operate upon shipments made to points "either within or without this State."

In Gibbons *v.* Ogden, Chief Justice Marshall said:—

> "To regulate commerce is to prescribe the rule by which commerce is to be governed." (9 Wheat. 163.)

In Leisy *v.* Hardin, 135 U. S. 100, this court said, in referring to various decisions, that they were

> "clear to the effect that neither licenses, nor indirect taxes of any kind, *nor any system of State regulation* can be imposed upon interstate commerce any more than upon foreign commerce, and that all acts of legislation producing *any such result* are to that extent unconstitutional and void."

And in Hall *v.* DeCuir, 95 U. S. 485, this court said: —

> "But we think it may safely be said that State legislation which seeks *to impose a direct burden* upon interstate commerce, or to *interfere directly with its*

freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. It was to meet just such a case that the commercial clause in the constitution was adopted."

In Wabash Ry. Co, *v.* Ill., 118 U. S. 557, this court had under consideration a statute prohibiting a railroad from charging more for the transportation of passengers and freight for any distance within that State than might be charged for similar service for a greater distance over the same road. This court held that it would follow the construction of the statute by the State court making it applicable to shipments originating in Illinois destined to points in other States, and that, under that construction, such transportation was commerce among the States, even as to that part of the voyage which was wholly within the State of Illinois, and that as to such commerce its regulation was confided exclusively to Congress by the constitution of the United States, and farther that a statute of a State intended to regulate, or to tax, or to impose any other restriction upon the transmission of persons or property from one State to another is not within that class of legislation which the State may enact in the absence of legislation by Congress; and that such statutes are void, even as to that part of such transmission which may be within the State. The law of Illinois was therefore held to be void. In that

case the court quoted with approval from the case of Hall *v.* DeCuir, p. 571. It is to be noted that the statute under consideration in that case only purported to control or regulate the transportation within the State of Illinois, and this, together with the absence of congressional legislation, was made the basis of a dissenting opinion, which does not, however, destroy the force of the opinion of the majority as applicable to the case at bar. The statute involved in that case was a regulation of railroads in the discharge of their public duties as carriers, which is not the nature of the law involved in the case at bar, because there was no public duty resting upon a carrier to transport beyond its own line.

In R. R. *v.* Illinois, 163 U. S. 142, this court held to be unconstitutional a statute of Illinois requiring railroad companies to stop their trains (which the State court held to include fast mail trains) at county seats long enough to receive and let off passengers with safety. This was held to be unconstitutional both because it was a hinderance and obstruction to interstate commerce and the passage of mails of the United States.

The statute now under consideration, as already stated, is made to apply to business between the States. In fact it is so drawn that there never would be any question about its applicability to carriers whose domicile and line were entirely without the State of Missouri. It is not even limited to the receipt of goods or to the issuing of bills of lading in that State which may contemplate transportation out of the State. It would be equally applicable to a carrier out of that State issuing a bill of lading or receiving goods from some other State into that State; or, as is sometimes done, to a carrier having its line out of that State issuing a bill of lading from some point upon another line in that State to be transported to a point out of the State.

If it is true, then, as said by this court, that "any

statute which seeks to impose a direct burden upon interstate commerce, or interfere directly with its freedom, does encroach upon the exclusive power of Congress," then this statute conflicts with the constitutional provision reserving such matters to Congress. The conclusion cannot be avoided that it interferes with the freedom of commerce and inposes a burden upon it to abrogate an old rule and establish a new one which assumes to make one carrier liable for the negligence and default of another.

In the opinion delivered by Division No. 2 in this case, Rec., p. 68, the view was expressed, and supported by abundant authority, that this statute was a regulation of commerce, and that if it was construed as being operative beyond the boundaries of Missouri, it was unconstitutional. Certainly, that conclusion of three of the members of that court, founded upon the authority there cited, was worthy of some notice, at least, when the court undertook to assert a different conclusion, upon the strength of much weaker authority. Again, that court in the case of Grimes *v.* Eddy, first, in Division No. 2, 27th Southwestern, 479, and subsequently through the court *in banc*, 126 Mo. 168, and then again in Selvege *v.* R. R., 135 Mo. 163, held that sections 953 and 954 of the statutes of 1889 were void as an attempted regulation of interstate commerce. That was a statute which placed upon the carrier the burden of responding in damages for any losses occasioned by the transportation of Texas cattle into or through the State of Missouri. That statute limited the freedom of commerce in transporting such articles of commerce through the State. Is there any difference, I ask, between such a burden and such a limitation upon the freedom of the carrier and that which imposes the burden of responding for the negligence of some one else?

Again, in the case of Stanley *v.* Wabash Ry., 100 Mo. 435, the Supreme Court of Missouri held that a statute

which required railroad companies to furnish double-deck cars for the shipment of sheep and providing a penalty for failure to do so, so far as it was attempted to be applied to interstate shipments, would be a regulation of commerce and a violation of the Federal constitution. Again, I ask, is there any difference in effect between the burden there imposed and the limitation thus placed upon the freedom of the carrier and that which is attempted to be done by section 944 in putting upon the initial carrier the burden of the negligence of a connecting carrier, and in limiting the carrier's freedom to receive and contract for its part of the transportation of freight destined to a point beyond its own line?

The cases relied upon by the Supreme Court of Missouri to sustain the validity of the statute in question seem to proceed upon the theory that a law to be void as a regulation of interstate commerce must be one fixing rates or imposing restrictions. Whether the Missouri court meant to impose any such limitation we can only determine from the fact that it relied upon such authority only. Such, however, is not the law, as appears from the cases above cited.

In the last opinion in the case at bar the court says:—

> "The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States subject to congressional regulations.
>
> "The statute merely prohibits a carrier who by contract undertakes to transport property to a point beyond its own route from relieving itself of responsibility for neglect to properly perform its duty. It

only imposes the duty and liability which the law, from consideration of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other States.

"A statute of Iowa which provided that no contract of a common carrier should exempt it from its common law liability was held by the Supreme Court of that State not to be in conflict with the commercial power of Congress prescribed by the constitution."

There is no theory upon which the first clause above quoted can be justified unless it be that a requirement of a statute is not a regulation of commerce unless it affects the compensation which may be charged. That was undoubtedly the view of the Missouri court, because it says: "Carriers are left free to make their own contracts in regard to compensation," thus impliedly saying that they are not free to make contracts in regard to other matters, and in fact that is what had previously been decided by the court in regard to the stipulation limiting liability in the case at bar. Then, in farther explanation of its position in sustaining the validity of the law, the court characterizes the statute as one which prohibits a carrier from relieving itself of responsibility for neglect to properly perform its duty, and, in support of that, refers to the Iowa decisions, which hold that a law forbidding contracts exempting carriers from common law liabilities are not unconstitutional. This shows the scope of the view taken by the Supreme Court of Missouri of the question of the constitutionality of the statute under consideration. Other cases similar to those cited from Iowa may be found, and, regardless of what opinion may be held concerning them, it is sufficient to say that the statute now in question is not at all similar to the ones there passed upon. Those were

statutes which prohibited exemptions from common law liability. So far as common law liability arising from the carrier's own negligence is concerned, these statutes were wholly unnecessary, because the settled law was that contracts exempting from liability for such negligence were nugatory independently of such statutes. A carrier's common law liability of any kind arises from its character and its public duty, and is not in any manner dependent upon the contracts that it may make. As has already been shown, however, the transportation by a carrier beyond the terminus of its own line is purely a matter of contract not arising out of any public duty. It is not a service which the carrier must render unless it wishes to do so. It is purely voluntary. There is no question of public policy involved. Therefore, a statute imposing the burden of such service upon it, or one imposing the burden of liabilities in consequence of such service voluntarily assumed regardless of the stipulations of the contract through which alone such extra service is to be rendered is not to be treated as a statute prohibiting exemption from a duty already existing, or from a liability already resting upon the carrier. In the case at bar, however, the court evidently fell into the error of first assuming that this duty of extended transportation was imposed upon the carrier, and that therefore the act in question was to be regarded as similar in effect to statutes forbidding exemption from common law liability.

But whatever may have been the theory upon which the court proceeded, the result is that Sec. 944 of the Revised Statutes of Missouri is construed by the Supreme Court of that State as applying to shipments originating in the State of Missouri destined to points in other States. Such business, under the decisions of this court, is "commerce among the States." And farther, under the construction of the State court, the statute imposes upon the initial carrier liability for loss or damage resulting from the acts of

a subsequent carrier, and forbids any contract limiting such liability. Under the decisions of this court such an enactment is a regulation of commerce. It is the imposing of a burden which did not exist under the common law nor under the decisions of the State of Missouri before this statute was enacted, and, with the above propositions settled, it follows that the law must be held to be unconstitutional as being a regulation of interstate commerce. In concluding this argument, I can do no better than to again ask the attention of the court to the opinion first filed in this case and set forth in the transcript of the record at pages 68 to 71. It is worthy of comment that in the last opinion, so at variance with the general rules upon the several points, the court should have entirely lost sight of the former decisions in this case, and to have entirely failed to mention in any manner the former opinion by Justice Sherwood in which the views of the court and its decision were expressed in such lucid and concise manner, and where, among other things, it was said: —

> "Moreover, if section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of interstate commerce, and therefore violative of section 8 of article 1 of the Federal constitution. Stanly *v.* Railroad, 100 Mo. 435.
>
> "Any rule pertaining to the transportation of passengers or merchandise from one State to another is a regulation of interstate commerce, and, therefore, under the prohibitions of the Federal constitution, a State is inhibited from making such regulations. Case of the State Freight Tax, 82 U. S. 323.
>
> "In order to conspicuously show that the statute construed as plaintiffs desire is plainly such a forbidden

regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandise transferred to that State from this State, and at variance with section 944 aforesaid. As is aptly elsewhere said, 'Commerce cannot flourish in the midst of such ambarrassments.' Hall *v.* DeCuir, 95 U. S. 485. See also Gibbons *v.* Ogden, 9 Wheat. 1; Pickard *v.* Pullman, 117 U. S. 34; Hardy *v.* Railroad, 18 Am. & Eng. R. R. Cas. 432; Carton *v.* Railroad, 59 Iowa, 148; Louisville *v.* Com'rs 16 Am. & Eng. R. R. Cas. 1.

"For the foregoing reasons, as it is evident that plaintiffs have no standing in court, the judgment will be simply reversed. All concur."

That view, I submit, should now prevail in preference to the last expression of the State court, and the judgment heretofore rendered sustaining the validity of this statute should be reversed.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Supreme Court, U.S.
FILED
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JAMES H. McKENNEY
CLERK

No. 11.

Brief of Jackson for P. E.

Filed Oct. 7, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM C. McCANN AND MILTON D. SMIZER, PARTNERS UNDER THE NAME OF McCANN & SMIZER.
No. 11.

In Error to the Supreme Court of the State of Missouri.

ADDITIONAL ARGUMENT FOR PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Nixon-Jones Printing Co., 215 Pine St., St. Louis.

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In Error to the Supreme Court of the State of Missouri.

ADDITIONAL ARGUMENT FOR PLAINTIFF IN ERROR.

Upon the occasion of the argument of this case at the last term a manifest effort was made by counsel for the defendant in error to avoid the consideration of the validity of the Missouri statute in

question, by contending that the contract of shipment involved was in itself an absolute and unconditional special contract, assuming the obligations and liabilities of a common carrier throughout the entire distance from Stoutsville, Missouri, to Chicago, Illinois. This subject was considered in the original brief and argument of the plaintiff in error beginning at page 27, and it is only considered necessary at this time, by way of answer to this contention of the defendant in error, to refer generally to those circumstances of law and fact which, we think, entirely refute this contention.

First. The authorities heretofore cited clearly establish that a railway company is not a common carrier beyond the termini of its road, and is under no duty to carry for anyone beyond its own road, and no question of public policy is involved in its doing or refusing to do such additional business, nor in any stipulation that may be made concerning the same. It is purely a matter of contract between the proposed shipper and the carrier whether the latter shall undertake any service beyond the termini of its road. Its obligation to carry and any liability arising from an improper discharge of such obligation depend entirely upon a special contract on that subject, either express or implied.

As has been decided by this court: —

> "In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful

expressions or loose language, but only from clear and satisfactory evidence."

Myrick v. R. R., 107 U. S. 102;
R. R. v. Mfg. Co., 16 Wall. 318, 324;
R. R. v. Pratt, 22 Wall. 123.

And to the same effect are the decisions of the Supreme Court of Missouri.

Coates v. Express Co., 45 Mo. 238;
Snider v. Express Co., 63 Mo. 376;
Sewing Mach. Co. v. R. R., 70 Mo. 672.

Second. The contract involved in this case cannot, under the rules of construction, be regarded as a special agreement assuming the duties and liabilities of a common carrier beyond the terminus of the Missouri, Kansas & Texas Railway. The defendant in error singles out one clause in the contract, and, in utter disregard of every other portion of the written instrument which was signed by both parties, construes it to be a special contract assuming the obligation and liability of a carrier to the point of destination.

That clause reads: —

"Now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the party of the second part the live stock described below and the parties in charge thereof, *as hereinafter provided:* namely, six

cars said to contain 95 head of cattle, from Stoutsville Station, Missouri, to Chicago, Illinois, Station."

Regardless of what would be a proper construction of that clause if it stood alone, it is certainly very materially qualified by what follows. Undoubtedly the use of the words "as hereinafter provided," had some significance, and they referred to the stipulations that were to follow in the contract. When we act upon the suggestion of these words "as hereinafter provided," and look to the other parts of the contract, we find, in the very sentence in which it is said the carrier is to transport the cattle, the qualification that it is to be done for the consideration of the mutual covenants and *conditions* herein contained, showing at the very outset that the contract was not to be absolute and unconditional, but that it was expressly stated that the transporting of the cattle was involved with conditions. Then, in the clause following the general stipulation for transportation, the shipper released the railroad company from the liability of common carrier, and agreed that the liability should be that of a mere *forwarder* or private carrier for hire. We do not contend that so far as its own road was concerned a carrier could by such stipulation relieve itself from the duties and obligations of a common carrier. Those are imposed upon it by public law, and it would be against public policy to allow it to stipulate against the full effect of these duties and obligations imposed by law.

But, as established by the authorities cited in the original brief, there is no public duty or obligation resting upon the railroad company concerning transportation of property beyond its own line. There is no public law which requires it to carry beyond its own line. Whether it shall assume any obligations or liabilities in that respect depends entirely upon whether or not it makes a special contract for that purpose, and however it may contract, and whatever stipulations it may enter into, they do not involve any question of public policy pertaining to common carriers. Therefore, the stipulation in this first paragraph, although inoperative as to the transportation over its own railroad, is entirely valid with reference to what the railroad company might do beyond the terminus of its road. Hence, the stipulation that its liability should be that of a mere forwarder was a qualification of the duty and liability that it assumed with reference to the transportation of the cattle beyond its own line. It was a common carrier in every sense of the term, with all the liabilities pertaining thereto, from Stoutsville to Hannibal, but from Hannibal to Chicago it was only a forwarder, by reason both of this express stipulation in the contract and of the rule of law thoroughly settled in Missouri,— except in so far as it is modified by the decision in this case now complained of.

In the fourth paragraph of the shipping contract it is expressly stipulated that among other things the party of the first part, the carrier, is released from injuries arising from causes other than and except from its own negligence, and then in the thir-

teenth paragraph is the express stipulation that the party of the first part, the carrier, "shall be released from liability of every kind after said stock shall have left its road, and the party of the second part (the shipper) hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas & Texas Railway, excepting to protect the through rate of freight named herein." In the face of these stipulations in the contract it seems idle to contend that this could be a special contract imposing the duties and liabilities of a common carrier throughout the entire distance. All of the stipulations were embodied in the same instrument. All became part of the agreement by the execution of the same instrument, and so far as the making of the contract was concerned no one of the stipulations preceded the other. If there is anything in the rule that every part of a contract is to be considered, and the whole to be construed together, then certainly the limitation upon the liability was as much a part of the agreement as the undertaking to transport the cattle in any manner or by any means.

Third. It is wholly immaterial what contention may be made in that respect, because the Supreme Court of the State of Missouri, in rendering the decision now complained of, as well as in the previous opinion filed in this case, has repudiated this contention of the defendant in error, and

has only given the contract the effect of one for through transportation by reason of the force of the statute as interpreted by the court.

At the very outset of the last opinion that court said:—

> "As the contract must be construed so as to give proper effect to the statute, the interpretation of Sec. 944 in its application to the contract is also necessary."

Again, in attempting to limit the effect of their previous decision in the case of Dimmitt v. R. R., 103 Mo. 433, that court said: —

> "This ruling was in accord with the decisions of the English courts, but under the law as it existed in Missouri prior to the statute, upon the facts shown to have existed the receiving company would not have been liable for the loss."

It is proper and necessary, therefore, that we commence our consideration of this case with the assumption, — so manifest from the terms of the contract itself, and so clearly expressed by the Missouri court, — that, but for the effect of this statute, there would have been no liability, and therefore if the statute transcends the power of the State as a regulation of interstate commerce, the judgment in this case must be reversed.

Since, then, the Supreme Court of the State of Missouri has decided that but for the statute in question the contract as made by the parties would

have been enforced, and therefore this plaintiff in error could not have been held responsible for the default of the connecting carrier, and since that court has interpreted the statute of Missouri as forbidding such qualification of the contract as would limit the carrier's liability to its own line, and farther interpreted the statute as imposing a liability upon the first carrier for the negligence of the other, and as declaring a conclusive liability in such case, it is only necessary that we should farther consider whether the change in the method of doing the business accomplished by this statute is to be regarded as a regulation of interstate commerce, and therefore in violation of the constitution of the United States.

Since this case was last before the court, the case of Richmond & Alleghaney R. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 311, has been decided by this court. While the statute construed in that case was materially different from the one now under consideration, yet the reasoning of the case has a direct bearing upon the questions in this case, and I submit should result in a decision favorable to this plaintiff in error. A statute of Virginia was sustained in that case for the reason that as construed and applied by the State court it could not be regarded as a regulation of commerce because it was expressly held that the Virginia law sanctions a contract made by a carrier to limit its liability. It was farther held that the Virginia statute, without placing any restriction upon contracts that might be entered into by

carriers, simply established a rule of evidence fixing the character of proof by which a carrier might show that it had limited its liability. A comparison of the statutes of the two States of Virginia and Missouri will show the radical difference between them. The Virginia statute only provided that a carrier who accepted goods for transportation beyond the terminus of his own line should be deemed thereby to assume an obligation for the safe carriage to destination unless at the time he was exempted from such liability by contract in writing signed by the shipper. The Missouri statute provides that the carrier receiving property or issuing bill of lading for transportation to any point either in Missouri or in any other State, shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier. There is no recognition in the terms of the statute of any qualification or limitation of this liability, as there is in the Virginia statute, and in the opinion of the Supreme Court of the State now complained of it is, as already shown, expressly decided that in such case this statute declares a *conclusive liability*, because as is stated in that opinion, "the statute forbids such qualification of the contract." The decision in the Virginia case puts the subject in very much the same situation in which it was left by the decision of the Supreme Court of Missouri in the case of Dimmitt v. R. R., 103 Mo. 433. In that case the statute was attacked as being unconstitutional, because it was a regulation of interstate com-

merce. Tacitly conceding the force of this criticism, if the statute was construed as it previously had been in the State, the court, in the Dimmitt case, in order to avoid holding it invalid, construed the statute as being one changing the character of proof, and therefore relating only to the subject of evidence. It was therefore decided that this statute was intended to modify the previous rule as to the necessary proof of a special contract to hold a carrier liable for loss beyond its own line, by enacting that the receipt of goods or the issuing of a bill of lading for transportation beyond the carrier's line was thereafter to be regarded as sufficient evidence of a contract assuming liability beyond its own line. As thus interpreted, the statute did not in any manner restrict the right of the carrier to limit the liability to its own line.

It was said in the Dimmitt case, 103 Mo. 442:—

> "By its (the statute's) provisions, the act of acceptance by a common carrier of property to be transferred to a place beyond the terminus of its route is *evidence* of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading of property to be transmitted to a place beyond the terminus of the road of a common carrier *is evidence of a contract* by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, or, what is

> equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line."

This construction of the Missouri statute was acquiesced in and followed for some time, as shown by the cases cited under Point VI of the original brief, and as long as that interpretation was followed the statute was in its effect the same as the Virginia law, and with that interpretation and effect it could not be objected to as a regulation of commerce. Under that interpretation the same right was reserved to the carrier to limit his liability as was given by the Virginia statute, and by the interpretation put upon that statute by the Supreme Court of Virginia. The decision of the Supreme Court of Missouri in the Dimmitt case was equivalent to a ruling that if any other interpretation had been given to the statute it would have rendered it obnoxious to the Federal constitution. The two interpretations given to this aw by the Supreme Court of Missouri must not be confused. The former decisions in the Dimmitt and succeeding cases emphasizes the construction afterwards put upon the statute in the opinion now complained of. As already shown, the statute under this latter interpretation, which is complained of, is not limited to a modification of the rules of evidence, as it was in the Dimmitt case, or as the Virginia statute was construed, but the interpretation now put upon it expressly excludes any such purpose of the law, and says that the intention of the statute was to fix a conclusive liability, and to forbid any limitation of the same.

Among other things the opinion says upon this subject:—

> "The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and to declare a liability for negligence without regard to which was in fault."

This interpretation of the law takes the Missouri statute entirely beyond any sustaining influence of the opinion of this court in the Virginia case. In that case this court pointed out the distinction between the substance of the agreement upon which the minds of the parties met, and the mere evidence by which such agreement might be proved, and it was shown that the statute there in question only assumed to regulate the evidence by which a contract might be established.

In that case the court used this language:—

> "It is manifest that the statute of the State of Virginia in question does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that although it received goods for transportation beyond its own line, nevertheless by agreement its liability was limited to its own line. That this is the sole purpose of the statute seems too plain for anything but statement. It leaves the carrier free to make such limitation as

> to liability on an interstate shipment beyond its own line as it may deem proper, provided only the evidence of the contract is in writing and signed by the shipper. The distinction between a law which forbids a contract to be made and one which simply requires a contract when made to be embodied in the proper form is as obvious as is the difference between the sum of the obligations of a contract, and the mere instrument by which their existence may be manifested."

That of course does not commit this court to holding that the converse of any part of that statement is true, yet I submit it is a fair deduction from what is there said that if a statute goes beyond the mere matter of evidence and fixes a conclusive liability regardless of what the parties stipulate, and forbids any limitation upon that liability, and does not leave the carrier free to make such contract as it may deem proper concerning its liability on an interstate shipment beyond its own line, then we have a law whose purpose is too plain for anything but statement, and that purpose, as decided by the Supreme Court of Missouri, is, not to fix the character or quantity of evidence required, but to impose a liability upon the initial carrier for any loss sustained, even beyond his line, regardless of which is at fault,—to fix "a conclusive liability" upon the initial carrier for the negligence of a connecting carrier, even in another State, and to forbid any attempt to modify or limit such liability, and annulling any stipulation that may be entered into for that purpose. That is a contract which clearly

falls under the first branch of the distinction suggested by this court as existing "between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form." While the Virginia case is not necessarily conclusive of the case at bar, I submit it is a strong authority in support of the contention of the plaintiff in error.

Upon the former hearing of this case the inquiry was made whether or not under the decision complained of, the Missouri statute did not leave the carrier free to limit its liability. To that question I answer: In a certain literal sense, yes; with any practical effect, no. To understand clearly the position of the Supreme Court of Missouri we must again refer to the decision in the Dimmitt case. In that case the court decided that the statute regulated the evidence by which contracts limiting the liability might be established, and there it was said that "in order to defeat the *prima facie* case made by the statute from the mere acceptance of the goods for through transportation, the carrier must show that by a specific agreement it only contracted to carry to the terminus of its own line, *or what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line.*" When the same court came to consider this statute in the present case, it held that the part of the above quotation reading "or, what is equivalent, that there was a specific agreement that it was only to be liable for loss or damage occurring on its own line" was mere dictum,

and that part of the former opinion was repudiated, and therefore the so-called recognition of the right to limit the liability beyond the carrier's own line was restricted to the right to make a contract for carriage only upon its own line. It is patent upon the mere statement that this accords no right at all, because there can by no possibility be any liability beyond the carrier's own line if he only contracts to carry over that line, and therefore all the right that is reserved, if it may be considered such, is the right to avoid liability upon any other line by refusing to make a contract for carriage over such other line. That is, a carrier who might engage in interstate transportation over his own and other lines may avoid liability for loss occurring on those other lines by contracting to carry only over his own line, or in other words by withdrawing from the business of interstate transportation. There was no occasion for the statute in order that the carrier might have a right to restrict his liability by simply contracting to carry over his own line. There is no pretense anywhere that there was any law which required the carrier to make a contract beyond his own line. That right existed independently of the statute, and therefore I say, in farther answer to that inquiry, that the Missouri statute, as now construed by the Supreme Court, amounts simply to one of two things. Either it is a prohibition upon a carrier's receiving property or issuing bills of lading for transportation beyond its own line, or it is an imposition of absolute liability upon the carrier, which receives the freight or issues the bill of lading for such trans-

portation, for any loss that may occur whether upon its own or some other line. Under this interpretation, the right to limit the liability beyond its own line does not exist with any practical effect, because there can be no limitation upon the liability in any case where there is to be transportation beyond the original line.

This leaves as the only question to be considered: Does this statute, which is construed as prohibiting any limitation upon the liability when the transportation is beyond the terminus of the line of the receiving carrier, amount to a regulation of interstate commerce?

Since the former argument of this case, this court has also decided the case of Chicago, Milwaukee & St. Paul R. R. Co. v. Solan, 169 U. S. 133. An Iowa statute, to the effect that no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from the liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule or regulation been made or entered into, was sustained in that case. The cause of action upon which that suit was brought arose within the State of Iowa.

Referring to various statutes which were in the nature of police regulations, this court said: —

> "So long as Congress has not legislated upon that particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative

rights and duties of all persons and corporations *within its limits.*"

And then speaking of the Iowa statute, the court said, at page 138 of the report: —

> "The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa,— which is the only matter presented for decision in this case,— clearly comes within the same principle and it is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or regulate the rate of tolls, fare or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods."

Contrasting the case at bar with the one there decided, we find a difference in all the essential particulars. This was not intended to regulate the relative rights and duties of persons and corporations *within* the limits of the State of Missouri. It did not only concern the liability of the carrier for injuries happening within the State of Missouri. Its object and effect were not to make more sure that the plaintiff in error would perform any duty resting upon it by virtue of its employment as a common carrier, nor to exact of it more care or diligence in the transportation of passengers and goods. It transcended all these matters, and assumed to impose a liability upon

this carrier, not for anything that it might do or fail to do in the State of Missouri, but for the negligence or omission of another carrier in the State of Illinois. It was not an attempt to exercise the police power of the State of Missouri by regulating the relative rights and duties of persons and corporations within that State. It was an assumption of power with reference to what might be done or what might be omitted to be done in the State of Illinois, by fixing a liability upon a party in the State of Missouri. The statute could in no manner improve the service of a carrier in Missouri by making it liable for the fault of another carrier in Illinois. No matter how latitudinous the doctrine of "police power" may be, I think we may safely assert that it has never been extended so far as that a State may exercise that power by legislating for the control of any sort of business in another State. Certainly the police power of the State of Missouri is limited by the boundaries of that State, and when this statute assumed, as it does by its terms, to fix the liability on account of what might occur "within or without this State (Missouri)," it stamped the legislation as something wholly different from the exercise of the police power of the State of Missouri.

Another view of the statute shows that it was not intended, and cannot be justified, as a police regulation. Certainly, in addition to being confined in its effect to the State in which it was enacted, a law designed as a police regulation should relate to the performance of some duty or the protection of some

right existing under the general laws of that State. As already suggested, this law was neither designed, nor does it have the effect, to insure a proper discharge of any duty which the Missouri corporation owed, but, as decided by the Supreme Court of Missouri, in the opinion now under consideration: —

> "The statute does not undertake to change the law in respect to liability of a carrier for his own negligence but to extend it to the connecting carriers as well, and to declare a liability for negligence without regard to which was in fault."

Which means only that the statute does not attempt "to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods," but instead, and notwithstanding they were entirely without fault in the discharge of the duties resting upon them, to make them responsible for the negligence of some other carrier. Unlike the Virginian statute before mentioned, and unlike the construction heretofore put upon this statute in the Dimmitt case, it does not, by prescribing a rule of evidence, bring the initial carrier into the attitude of having entered into a contract assuming the responsibilities of a carrier throughout the entire distance. This Missouri statute does not deal with the subject as though the first railroad company had become the carrier throughout the distance. On the contrary

it recognizes the participation of two distinct agencies in the completion of the transportation, and provides that the one which may be subjected to the burdens of the statute shall have a right of action against the other, which was within the contemplation of the statute, although it was entirely beyond the confines of the State of Missouri. This clearly establishes that, in so far as this law can be said to have any feature of a police regulation, it assumes to operate upon an agency beyond the jurisdiction of the State. We may, I think, dismiss any idea that this might be regarded as a police regulation, and if it is not that then it seems impossible to consider it in any other light than as a regulation of commerce. Whatever it is, there is no question that it relates to commerce between the States. The statute by its terms is made to apply to shipments to points "either within or without" the State of Missouri, and the Supreme Court of that State, in this present case, applied it to a shipment originating in the State of Missouri, and destined to a point in the State of Illinois. Both by its terms and its application it relates to commerce between the States.

If we are right in what has been said up to this time, then it must be regarded as a *regulation* of commerce. Of course we do not contend that everything that applies to commerce or affects it indirectly is to be considered a regulation of commerce. Nor do I know that there is a case decided by this Court which is exactly like the present one, and in view of the great care with which this court has restricted its various decisions to the particular ques-

tions before it from time to time, it is not probable that we can cite a case which is so conclusive in its statement of the law as to render nothing more than the citation necessary.

Perhaps the most comprehensive statement of the law upon the subject is that of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 163, where he said: "To regulate commerce is to prescribe a rule by which commerce is governed." Certainly the statute now in question prescribes a rule for the government of commerce. But for this statute, the business would have been conducted in a different way, with different responsibilities and different liabilities upon the part of the carrier. Law is a rule of action, and a regulation is but fixing a rule. To make a new rule is to regulate. To enact a law which creates a new rule is a regulation — especially when it does not come within the exercise of the police power of the State. A new law or a new rule which requires the abandonment of previous methods and the substitution of new ones, and the incurring of entirely different liabilities on account of the doing of a particular thing, cannot well be designated as anything other than a regulation of that thing. As already shown, under the restrictions of the last decision of the Supreme Court of Missouri, there can be no possible limitation upon the liability on account of a shipment partly over a railroad in Missouri and partly over a railroad in Illinois, because it is said that the only way that the liability can be limited is by restricting the contract for carriage to the line

of the receiving carrier. The meaning and the effect of the statute as now interpreted by the Supreme Court of the State is either that the receiving carrier must not enter into any contract or receive any freight for transportation beyond its own line, or that it must be held conclusively liable for the negligence of the connecting carrier. Upon the one hand this is an absolute prohibition against transportation over connecting lines, while on the other hand it results in a conclusive liability for the defaults of a connecting carrier. Certainly if this is anything, it must be a regulation. Let us consider the first branch as it is presented by the decision of the State court, that is, an inhibition upon the extended transportation. Can it seriously be urged, if a statute provided that no railroad company should receive freight or issue bills of lading for transportation beyond the terminus of its own road, that such law would be a regulation of commerce? And if the statute was so broad that the prohibition extended to transportation from one State to another, could it be urged that that was not a regulation of interstate commerce? Again, if a statute said that there should absolutely under all circumstances be a conclusive liability upon the receiving carrier for all defaults and negligence of a connecting carrier, and that, whenever freight was received or a bill of lading issued for such extended transportation, there could be no limitation whatever upon such liability, and that any stipulation in the contract attempting such limitation was absolutely void, could it then be

urged that that was not a regulation, and if the extended transportation was from one State to another, would it not be a regulation of interstate commerce? Is not this what was impliedly decided by this court in the case of Richmond & Alleghaney R. R. Co. v. Patterson Tobacco Co.? Although it was stated in that case that the court did not express any opinion as to whether or not such a law would be a regulation of interstate commerce, is it not fairly deducible from the reasoning of the court in the case that it would be? We have the benefit of the opinion of the Supreme Court of Appeals of the State of Virginia, in that case, which conceded that if the law had denied the right of the carrier to limit its liability it would have been such regulation. If it is a regulation to prohibit interstate transportation over connecting lines, and if it is a regulation to impose and fix liability without the right to limit the same on account of interstate transportation over connecting lines, certainly it does not cease to be such regulation because these two regulations may be involved in the alternative in the same statute. It is none the less a regulation of commerce, that the burden imposed is coupled with the privilege of avoiding it by refraining from engaging in that business. In addition to the cases cited in the original brief upon the subject of what is a regulation of commerce, I cite the case of Western Union Telegraph Co. v. Pendleton, 122 U. S. 347. Certain statutes of Indiana required that telegrams should be delivered with impartiality, and in the order in which they were received under a

penalty in case of failure so to do. A message was sent from a point in Indiana to a point in Iowa. Suit was brought to recover the penalty of $100 because the statutes had not been observed.

The view of the court is concisely and sufficiently stated in the syllabi as follows:—

> "The statutes * * * are in conflict with the clause of the constitution of the United States which vests in Congress the power to regulate commerce among the States, in so far as they attempt to regulate the delivery of such dispatches at places situated in other States.
>
> "The authority of Congress over the subject of commerce by telegraph with foreign countries or among the States being supreme, no State can impose an impediment to its freedom, by attempting to regulate the delivery in other States of messages received within its own borders.
>
> "The reserved police power of a State under the constitution, although difficult to define, does not extend to the regulation of the delivery *at points without the State* of telegraphic messages received within the State; but the State may, within the reservation that it does not encroach upon the free exercise of the powers vested in Congress, make all necessary provisions in respect of the buildings, poles and wires of telegraph companies *within its jurisdiction*, which the comfort and convenience of the community may require."

That in that case the carrier was a telegraph company can make no difference. If the law of Indiana

could not control the transaction of the business in Iowa, and if because it attempted to do so it was a regulation of commerce among the States, then certainly the law of Missouri should not be allowed to control the transaction of the business of railroad carriers in the State of Illinois, and when it attempts to do so it too should be held void as a regulation of commerce among the States. If the power of regulation in regard to the telegraph company was confined to the jurisdiction of the State which assumed to enact laws, certainly the same limitation should be put upon laws which assume to regulate transportation by railroad companies. Nor does it make any difference that in the one case a specified penalty was named. It does not change the nature of the attempted regulation that in one case it is provided that the carrier by telegraph should pay a penalty of $100 and in the other case the carrier by rail should pay a penalty of all the damages arising from the default of a connecting carrier.

Moreover the Indiana statute which this court held void as a regulation of interstate commerce, only assumed to hold a telegraph carrier for its own default, while the Missouri law declares a liability against a railroad carrier on account of the default of another.

Another view of the question was suggested by any inquiry of the court concerning the effect of the interstate commerce law. I think now that the view I was inclined to take of the matter at that time was too restricted and unnecessarily unfavorable to the plaintiff in error. I think it was correct

enough to say that the interstate commerce law does not of itself control this case, because it does not compel any railroad company to engage in interstate commerce; but upon farther reflection I am satisfied that the proper view of the matter is that a railroad company having entered upon the transaction of interstate business in connection with other lines has put itself and its business in a position where there is a necessary conflict between the State statute and the act of Congress regulating commerce. By section 6 of that act the right of connecting carriers to unite and fix joint rates for the transportation of freight from one State to another is clearly recogized, and the spirit and effect of that section are to bring such carriers as desire to unite in making joint tariffs under the operation and control of that law. This was clearly settled by this court in the case of Cin., N. O. & Tex. Pac. Ry. Co. v. Interstate Com. Com., 162 U. S. 184.

At page 192 of that case it is said:—

> "But when the Georgia railroad company enters into the carriage of foreign freight by agreeing to receive goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act in respect to such interstate commerce."

While the record in this case does not in terms disclose that any joint rate had been agreed upon or filed with the Interstate Commerce Commission, yet it does appear that the live stock contract was for transportation of the cattle from Stoutsville, Missouri, to Chicago, Illinois, and in the clause which limited the liability it was expressly stated that this plaintiff in error was not to be held liable for anything beyond its own line "except to protect the through rate of freight named herein," it elsewhere appearing in the contract that a through rate of 17½c. per hundred pounds was stipulated from Stoutsville to Chicago. With this much affirmatively disclosed, we may invoke the presumption that the parties concerned had discharged the duty which the law had imposed upon them, and that joint tariffs had been agreed upon between the several carriers and had been filed with the commission. The plaintiff in error was therefore amenable to the interstate commerce law. By section 7 of that act it is made unlawful for the plaintiff in error to have in any manner prevented the carriage of the cattle in question from being continuous from the place of shipment to the place of destination. Having become a party to a joint tariff, the plaintiff in error would have violated the interstate commerce law if it had done that which the Supreme Court of the State said was the only thing it could do to avoid liability on account of the default of the connecting carrier. The State court said that the only manner in which the liability can be restricted

to its own line is by restricting the carriage to its own line. The interstate commerce law says that the carriage must be continuous from the point of shipment to the point of destination. Necessarily the interstate commerce act is a regulation of interstate commerce. If it is a regulation of that commerce to say that the transportation must be continuous, certainly it is another and an inconsistent regulation to say that it must terminate at some intermediate point which happens to be the terminus of one of the railroads involved in the transportation. The moving of commodities from one State to another is interstate commerce, whether it be transported over the line of a single carrier or over the connecting lines of several carriers, and even if it be true that one of the connecting carriers operates a road entirely within one State, yet, by virtue of the law of Congress, it is the right of that railroad company to become a part of a through line by an arrangement as to joint rates and charges. Until it is exercised this right is a mere abstraction. Since the right exists it may be exercised effectively, and whatever benefits may arise to the carrier or to the public are to be enjoyed without restriction from any State legislation. It cannot be contended, however, that the right to participate in this interstate business can be enjoyed by the plaintiff in error to the full extent, nor can it serve the public to its full capacity, if it is to be restricted as proposed by this State statute with the interpretation now put upon it by the Supreme Court of Missouri. Clearly it was the policy of Congress to extend to

the commercial world every facility for transportation between the States that might arise through any combination of any number of carriers and it was the intention, as nearly as possible, to put all these carriers engaged in the same sort of business between the same localities upon an equal footing. The burdens imposed by the Missouri statute, as now construed, could not, however, operate equally upon all railroads engaged in interstate transportation between the same points. The burden would be in proportion to the distance that the freight was transported over connecting lines. A railroad, which only carried freight a few miles over its own tracks and then delivered to a connecting line, to be carried for a long distance, would have a much greater risk imposed upon it than another railroad which would carry the freight over its own rails for the greater part of the distance and would only have to assume the risk of loss while the freight was being transported a few additional miles. Moreover, it is the policy of the law that the public should enjoy the benefit of competition between different lines of transportation, and therefore a law which operates to impose burdensome conditions on one hand, or, as an alternative, compel a carrier to withdraw from that business, ought to be considered as against public policy, — because it prevents that much competition. The case in hand is an apt illustration. If the shipper could load his cattle at his home station in Missouri into cars from which they need not be moved until they reached their destination in

Chicago; if he could secure a through rate for the entire distance, which could be settled by his commission merchant in Chicago; and if he could receive a through bill of lading which required no farther attention by him, certainly he has derived a great benefit. On the other hand, if the railroad companies interested in this transportation could avoid the additional handling in unloading and reloading at the point of junction, and if they could avoid the loss of time in the use of their cars which would result if each company had to have a sufficient number on hand to serve the purpose of this shipment, they too have gained an advantage and can afford to transport that much cheaper. But if the initial carrier, with only 30 or 40 miles of haul is denied the right to limit its liability to its own line; if it must remain under a conclusive liability to respond for all damage, that may occur from negligence or delays in the additional distance of several hundreds of miles, it cannot afford to do the business for the small proportion of the freight charge which it will be entitled to, and the effect of the application of this State law would be to drive this plaintiff in error out of that particular business, and in time to drive all other railroad companies in the State out of similar joint business, so that the end of the matter would be that all the companies operating railroads in the State of Missouri would be compelled to withdraw from any joint tariffs, cease to do any interstate business whatever, confine their transactions entirely to commerce within the boundaries of the

State of Missouri, and thereby deprive the people of the State of advantages which the law seeks to secure for them. I submit, then, that this State statute, as now construed by the Supreme Court, is legislation upon a subject upon which Congress has legislated; that its purposes and results are inconsistent with those of the law of Congress; that this act cannot be considered as a mere exercise of the police power of the State of Missouri, but that it is an attempted regulation of the business outside of the State of Missouri, and as such is a regulation of interstate commerce, and therefore the law, as finally construed and interpreted by the Supreme Court of the State of Missouri, must be held to be void, because it is in conflict with the constitution of the United States.

Respectfully submitted,

GEO. P. B. JACKSON,
For Plaintiff in Error.

No. 16267.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 161.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, - *Plaintiff in Error.*

vs.

McCANN & SMIZER, a co-partnership composed of WILLIAM C. McCANN and WILLIAM B. SMIZER - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF FACTS UPON THE PART OF THE DEFENDANT IN ERROR.

Not being favored with a statement of this case, as contained in the brief of the plaintiff in error, it is thought best to present a short statement upon our own part.

The action was begun in the Circuit Court of Monroe County, Missouri, by William C. McCann and Milton B. Smizer, a co-partnership, against George A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas & Texas Railway Company, defendants, in 1890, where judgment was obtained by the plaintiffs for the sum of $654.12. The cause was appealed to the Supreme Court of the State of Missouri, and heard at the October Term, 1893, before Division No. 2 of said court, which resulted in a judgment of reversal by an opinion rendered by Judge T. A. Sherwood. Pending a rehearing before said court both defendants, George A. Eddy and H. C. Cross, died, whereupon the cause was by agreement revived against the Missouri, Kansas & Texas Railway Company and said Company by agreement substituted as defendant.

Upon hearing the motion after the action was revived against the M., K. & T. Railway Company the court granted a rehearing therein and the case was transferred from Division 2 to the court in *banc*, where it again was heard the succeeding term of the court and the cause affirmed, all the judges concursing except Judge Sherwood, who dissented.

The petition states a common law action for damages against George A. Eddy and H. C. Cross, Receivers aforesaid, on account of negligent delay beyond a reasonable time in the shipment of ninety-nine head of cattle from Stoutsville, Missouri, to the Union Stock Yards at Chicago, Illinois The petition is set out in full on pages 5 to 8 in the printed transcript of the record filed in this court. The answer, on page 8 of the transcript, admits the receivership and operation of the road and receipt of the cattle November 9, 1890, for shipment to Chicago, but

avers that the shipment was made under special contract entered into between the parties in and by which contract it was agreed and stipulated, among other things, as follows:

"1st, That he [meaning the plaintiff] hereby releases the party of the first part [meaning the defendant] from the liability of a common carrier in the transportation of said stock, and agrees that said liability shall only be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive, release, and does hereby release said first party from any and all liability for or on account of any delay in shipping the said stock after the delivery thereof to its agent and from any delay in receiving the same after being tendered to the agent.

4th, That he, the said party [meaning the plaintiff] for the consideration aforesaid, hereby assumes, and releases said first party [meaning the defendant] from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock, caused by any mob, strike, threatened or actual violence to person or property, from any source, failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any stock, overloading cars, fright of animals, or crowding one upon another, or any or other causes except the negligence of said first party; and such negligence not to be assumed but proved by said party of the second part."

And said contract also contained, among other things, the following stipulation and agreement, which is pleaded in the answer as follows:

"13th, And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas & Texas Railway excepting to protect the through rate of freight named herein."

The reply was as follows:

"Plaintiff for reply to defendant's answer, filed in this cause, denies that plaintiff executed said alleged contract, set up in defendant's answer, and plaintiff further says that said alleged contract, if any, was wholly without consideration and void and contrary to public policy."

The evidence shows the execution by both parties of a contract of shipment, set out in full on page 25 of the transcript of the record. That the stock was received by the receivers under said contract and transported by them over the M., K. & T. to Hannibal, Mo., and from thence over the Wabash *in the same cars* into which they were loaded to Chicago. That there was a joint yard service at Hannibal, Mo., between the M., K. & T. Railroad Co. and the Wabash Railroad Co. That the M., K. & T. Railroad ended at Hannibal, Mo., at which place it further connected with the Wabash road. The defendant in error is shown to have had no control, care or custody over the cattle, after signing the contract, until he received them at the Union Stock Yards, Chicago, and that the M., K. & T. Railroad Co. made all arrangements with the Wabash Company for transportation over its line and received from the defendants in error the full freight charges for transportation over the entire distance, and paid the Wabash Company for its service in completing the contract of shipment.

The evidence also shows that there were *in fact no reduced rates given to defendants in error*, as recited in the contract, but that the same rates were charged, whether there was or whether there was not a special contract; that there was but one rate given to shippers of live stock between Stoutsville and Chicago and that was the rate named in this written contract and de-

clared therein to be a reduced and special rate. The plaintiff in error *offered no evidence* that any special rate was given *lower than the regular rate*, or that any option or choice of rates was tendered to the defendant in error.

And the evidence tended to show that the stock was shipped from Stoutsville to Hannibal without any unreasonable delay and that the loss and damage on account of delay occurred after the stock had left the line of road of the M., K. & T. Railroad.

Further, the evidence disclosed that the stock was negligently permitted to stand for *four* hours in the City of Chicago in less than *two miles* of the union depot, the point of destination named in the contract of shipment, during which time and delay the market for the class of cattle which constituted this shipment had declined twenty-five cents, on account of which decline in the market and subsequent loss and shortage in weight, during the time of their arrival and the time, they were sold and this and the cost paid for feed of said cattle, constituted the damages complained of.

The defendant asked the following instructions, which the court declined to give:

I. "The court instructs the jury that under the pleadings and and evidence your finding must be for the defendant.

II. "The court instructs the jury that under the contract read in evidence, under which plaintiff's cattle were shipped, the defendant are not liable for any damages sustained by delays or otherwise after said cattle were delivered by defendants to the next connecting carrier.

III. "The court instructs the jury that defendants are not liable under the contract of shipment read in evidence, for any damages or delays occurring on any other railroad than the one operated by the defendants, and if you find from the evidence that the defendants transported plaintiff's cattle from Stoutsville to Hannibal without unreasonable delay and delivered said cattle to the Wabash Railway Company, as a connecting carrier, within the time usually and reasonably required for such transportation and delivery, that the defendants are not liable in this case, notwithstanding said cattle may have been unreasonably delayed on said Wabash Railroad, and your finding must be for the defendants."

Whereupon the court, on its own motion, gave the following and seven other instructions in the case:

I. "If from the evidence the jury find that beyond the limit of a reasonable time upon the delivery of plaintiff's cattle at the Union Stock Yards at Chicago, Illinois, the Wabash Railway Co. negligently delayed said delivery and thereby directly caused pecuniary damages to plaintiff in the disposition of said cattle the jury will find for plaintiffs, and in default of such finding the jury will find for the defendants."

The other instructions are found on pages 57 and 58 of the transcript of the record. It is only deemed necessary to set out the first instruction of the court as it is conceded in this case that the other instructions properly declared the law, if under the contract and facts in evidence the defendant could be held at all for the negligence that occurred beyond its line of road.

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BRIEF OF ARGUMENT AND STATEMENT OF POINTS FOR DEFENDANT IN ERROR.

I.

The Supreme Court of Missouri did not err in deciding that Section 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the Constitution of the United States.

The said Statute is not repugnant to and in conflict with the Constitution of the United States; because (*a*) the statute, as interpreted by the Supreme Court of the State of Missouri, does not regulate or attempt to regulate commerce between the states; and, because (*b*) it neither requires the plaintiff in error to carry, nor prevents it from carrying any freight between the states mentioned, or any other states; and, because (*c*) it neither requires the plaintiff to contract for such carriage nor prevents it from making any valid contract limiting its liability either within or without that state. Nor does it impose any liability against the plaintiff in error which it is not against the policy of the law to permit it to avoid. Its only effect is to prevent it from releasing itself from liability for its own negligence or the negligence of its agents. It only prevents the carrier from assuming a contract for through carriage and at the same time avoid liability against itself and agents in the performance of its undertaking.

Dimmitt vs. Railroad Co., 103 Mo., 440.
McCann & Smizer vs. Eddy & Cross, 133 Mo., 59.
Liverpool & C. Co. vs. Phoenix Ins. Co., 129 U. S., 397.
N. J. Steam Novelty Co. vs. Merchants Bank, 47 U. S.—6 How. 344.
Michigan Central R. R. Co. vs. Min. Springs Mfg. Co., 83 U. S., 16 Wall 318 (21-297.)
N. Y. Central R'y Co. vs. Lockwood, 84 U. S., 17 Wall 357
Ogdenburg & L. C. R. Co. vs. Pratt, 89 U. S., 22 Wall, 123-134.
Bank of Ky. vs. Adams Express Co., 93 U. S., 174.

II.

The court did not err in refusing to give the three instructions asked by plaintiff in error, whereby it claimed release from all liability after the stock left its road; nor did the court err in giving of its own motion the eight instructions, beginning on page 59 of the transcript, because, by the through contract (set out on page 25 of the transcript) the plaintiff in error had bound itself to carry the stock to the place of ultimate destination at Chicago; therefore, its connecting carrier, the Wabash was its agent to complete its contract of shipment. The carrier cannot stipulate to release itself from its own negligence or the negligence of its agents.

Woods' R'y Law, Vol. 1, Sec. 1, 190, Pg. 545.
Wharton on R'ys, Sec. 589.
Hutchinson on Carriers, 2d Ed., Secs. 248, 257, 263.
Grover & Baker Machine Co. vs. Mo. P. R'y Co., 70 Mo.,674.
Holliday vs. St. L. K. C. & N. R'y Co., 74 Mo. 162.

Railroad Co. vs. McCarty, 96 U. S., 258.
Ogdensburg & Co. vs. Pratt, 22 Wall, 123.
R'y Co. vs. Lockwood, 17 Wall, 357.

III.

It is conceded that a carrier may, notwithstanding Sec. 994, Revised Statutes of Mo., 1889, limit its liability to negligence occurring on its own road, provided it contracts only to carry to the terminal point, stating it will carry the goods no further; or, what is equivalent, in the absence of a contract of through carriage, it may limit its liability to negligence occurring on its own line, yet, it cannot make a through contract or undertake to ship and deliver to a point beyond its line, unequivocally by contract binding itself to carry and deliver to point of destination, and, at the same time, limit its liability for negligence occurring on its own road. Such contracts are against public policy.

McCann and Smizer vs. Eddy, 133 Mo., 59.
Halliday vs. Railroad Co., 74 Mo., 161.

IV.

Contracts limiting liability are to be construed by the courts most strongly against the carrier. and all doubts and ambiguities will be resolved in favor of the shipper.

Hale on Bailments and Carriers, p. 9, 433.
Levering vs. Union Transp. Co., 42 Mo. 88 and cases cited.
Hutchinson on Carriers, 223, Sec. 262.

Even if Sec. 944 of the Revised Statutes of Mo., 1889, as construed by the Supreme Court of the State of Missouri, should be held to be repugnant to the Constitution of the United States, and even if it should be held that the carrier may contract, in proper terms, against his negligence on any part of the line of carriage, the plaintiff in error has not effectually contracted against such negligence in this case, because (*a*) it has not done so in plain, clear and specific terms, and because (*b*) by the terms of the fourth clause of the contract (page 27 of the printed transcript) the carrier is bound specifically for his negligence.

Hutchinson vs. Carriers, 2nd Ed., Secs. 261, 264, 270.
Westcott vs. Fargo, 61 N. Y., 542.
Maguire vs. Deusmore, 56 N. Y., 168.
Nicholas vs. Ry. Co., 89 N. Y., 370.
Canfield vs. Ry. Co., 93 N. Y., 532.
Holsapple vs. Ry. Co., 86 N. Y., 275.

V.

There was an expressed but no real consideration for such alleged releases. Plaintiff's uncontradicted evidence shows a total lack of said such alleged consideration.

McFadden vs. Mo. P. Ry. Co., 92 Mo., 351.
Fountain vs. Boatmen's Sav. Band, 57 Mo., 552.
York Mfg. Co. vs. Ill. Cent., 3 Wall, 107.
McMillan vs. M. S. & N. I. Ry. Co., 16 Mich., 116.

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ARGUMENT.

I.

The present contention between the plaintiff and defendant in error arises out of the construction which the Supreme Court of the State of Missouri has given the contract between the parties. The plaintiff in error contends that the Supreme Court of the State of Missouri in holding and deciding that Section 944 of the Revised Statutes of 1889, as construed by them in connection with the case, is repugnant to the Constitution of the United States.

And second, that said section of the statute above referred to is repugnant to and in conflict with the Constitution of the United States, for the reason that it attempts to, and if enforced according to its terms and purposes, does regulate commerce between different states; and that the Supreme Court of Missouri erred in holding that under the effect of said statute the plaintiff in error was liable in this cause for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point on another line of road in the State of Illinois.

In order to determine whether or not such error was committed as here complained of, it will be necessary to examine into the terms of the contract of shipment entered into between the parties and to ascertain, first, the liability which arises therefrom under the laws of the State of Missouri, irrespective of the

obligations imposed by the statute and, afterwards to ascertain what office or function the statute in dispute is made to perform by the court in the construction of the contract.

The Supreme Court of the State of Missouri held that the contract, which is set out in full on page 25 of the printed transcript of the record in this cause, is one of a through carriage by the plaintiff in error, and that in this respect it is an unconditional contract, by which the plaintiff in error bound itself absolutely for the carriage of the stock over the entire distance they were to be transported, and agreed thereby to deliver the same at the place of destination, namely: the Union Stock Yards at Chicago, Illinois; that the contract, construed as a whole, is susceptible of no other reasonable contention by the laws governing the construction and interpretation of written agreements; and that the thirteenth clause, and other clauses therein, even if valid and binding upon the shipper, are not clauses releasing, or attempting, or even purporting to release it from its primary duty of carriage which it assumed over the entire distance, but are clauses releasing, or purporting or attempting to release it from *liability* from such acts of carriers after such stock shall have left its line of road.

Such was the conclusion reached by the Supreme Court of the State of Missouri, and it seems to us that such must be the conclusion and holding of this court, when it reviews the language employed in the instrument itself.

For the purpose of discussing the scope of the obligation, which the plaintiff in error assumes, with respect to its contract of carriage, we will here quote only so much of the contract as

relates to the contract of the carrier. The instrument is headed "LIVE STOCK CONTRACT NO. 10," and recites:

"This agreement made and entered into between George A. Eddy and H. C. Cross, Receivers of the M., K. & T. Railway Company, parties of the first part, and M. B. Smizer, party of the second part, witnesseth, that, whereas, the Receivers of the Missouri, Kansas & Texas Railway TRANSPORT the live stock as per rules and regulations which are hereby made a part of this contract, by mutual agreement hereto; now, therefore, for the consideration and mutual covenants and conditions herein mentioned, the said party of the first part is to TRANSPORT THE LIVE STOCK DESCRIBED BELOW, AND THE PARTIES IN CHARGE THEREOF, as herein provided, namely, ninety-five head of cattle, m. or l. o. r. [meaning more or less at owners risk] from STOUTSVILLE, MISSOURI, TO CHICAGO, ILLINOIS STATION, consigned to Brown Brothers and Smith, at a through rate of 17 1-2 cents per hundred pounds from STOUTSVILLE, MISSOURI, TO CHICAGO, ILLINOIS, subject to the minimum weights applying to cars of various lengths, the same being a special rate, lower than the regular rate, or a rate mutually agreed upon between the parties, for, and in consideration of which the said second party covenants and agrees as follows:"

Then follows fifteen clauses enumerated in the contract, all limiting its liability and obligation as a common carrier between the points named; but, in none of which, is there any waiver or release from the obligation already assumed, TO CARRY the said live stock over the entire distance according to its original undertaking in the language of the contract above quoted.

In the face of language, so clear, concise and seemingly so susceptible of but one construction, it would appear trite and common place in counsel to dwell upon its meaning were it not for the contention of the plaintiff in error, that this obligation of through carriage, as above assumed, is so modified and limited by

the thirteenth clause of the contract as to be thereby transformed into a contract only to carry the stock to the terminus of its road, which ends in Hannibal, Missouri.

The said thirteenth clause, to which such magical virtue is assigned, only purports to be a RELEASE FROM THE LIABILITY attending its already assumed obligation or undertaking as a carrier over other lines of road, in the event the live stock mentioned is to be transported over other lines of road.

The following is the thirteenth clause in full:

"And it is further stipulated and agreed, that in case the live stock, mentioned herein, IS TO BE TRANSPORTED over the road or roads of any other railroad company, the said party of the first part shall be RELEASED FROM LIABILITY of every kind, after said live stock shall have left its road, and the party of the second part hereby so expressly stlpulates and agrees, the understanding of both parties hereto———that the party of the first part shall not be held and deemed liable for anything beyond the line of the Missouri, Kansas & Texas Railway, excepting to protect the through rate of freight named herein."

Now, can it be rationally contended that this clause last quoted has the effect to nullify the primary agreement, as already expressed, to carry the stock and the parties in charge thereof, from STOUTSVILLE TO CHICAGO? Certainly it does not say so. There is nothing in the language employed that would indicate such an intention. It only says: "That in case the live stock is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after the stock shall have left its road." Mark the language, "in case the live stock is to be transported." Transported by whom? Evidently by the party of the first part, the M., K. & T. Railroad Company,

who has agreed to carry both the shipper and his stock. Not to Hannibal, or any other point named or intimated, but to Chicago as plainly expressed. Who else had agreed to transport the stock at all? With whom else had the defendant in error any agreement of carriage at all? Observe again the following language: "In case the stock mentioned is to be transported, etc., the party of the first part shall be RELEASED FROM LIABILITY OF EVERY KIND after said stock shall have left its road." Shall be released from what? Not from the obligation of the carrying beyond the road, because it had already undertaken to carry the stock to Chicago. It did not ask a release from its obligation to carry the stock to Chicago; it seeks no release from its obligation. Then what what release is asked by this clause? Plainly, as there stated, *a release from liability* for such carrying beyond its road. What other meaning, consistent with the contract as a whole, could be attached to the clause here quoted, if we apply no other rule of construction than that of logic and common sense? There was no other meaning intended by the author of this contract and none other can be rationally imputed to it and preserve the integrity of the contract and secure harmony among its clauses. The primary undertaking is to transport from Stoutsville to Chicago. The word "transport," as defined by Webster, means "to carry or to convey from one place to another; to remove; to convey." In the case of Ogdenburg, etc., Railroad Co., vs. Pratt, 22 Wall. 123, where the language of a way bill described "merchandise transported from Pottsdam to Boston," the court held that the word "transport" and "carry" were equivalent terms.

Hence, it would seem to us, that the Supreme Court of the State of Missouri properly held in the following language, in McCann & Smizer vs. Eddy, 133 Mo., that:

"The agreement to carry from Stoutsville to Chicago is absolute unconditional and that the thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to release itself from the liability of answering for the negligence of the carrier by which it undertook to complete its contract."

The court further held that:

"The statute forbids such qualification of the contract, which can only be held to relieve the defendant from its common law liability."

Whereupon under this condition of facts the question presented to the court was: May a carrier under the laws of the State of Missouri make a contract of through carriage, complete and binding in itself, by which it secures the right and privilege of a through line of road and all the advantages of through carriage; and may it take away from the shipper the care, custody and control of his stock until they should be redelivered to him or his consignee at Chicago and divest him of all right to make any other contract, and receive from him a full compensation for its agreement to ship over the entire distance, and employ and pay other companies and agencies to aid it in the completion of its agreement, and at the same time avoid all liability for the negligence of those whom it employes and pay to complete its contract and agreement?

The Supreme Court of Missouri thereupon held that:

"The dictum in the Dimmitt case, 103 Mo., 440, to the effect, that an agreement that a carrier should be only liable for loss or damage occurring on its own line of road, was equivalent to an expressed contract to *carry* the property *only* to the terminus of

its own line, cannot be taken as the law of this case, where there is an expressed contract (to carry) and an agreement for non-liability."

And, in this case, the state court simply held that:

"The statute merely prohibited a carrier who by contract undertakes to transport to a point beyond its own route, from relieving itself from responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law from considerations of public policy imposes upon all common carriers in transportation of property over their own lines, though they may extend into other states."

II.

The plaintiff in error asked for three instructions. The first a peremptory instruction asking for verdict and finding for plaintiff in error. The second asked the court to declare that it was not liable for any delays after the cattle were delivered to the next carrier. The third asked the court to declare that, under the contract in evidence, it was not liable for any damages or delays upon any other railroad than that operated by the defendant. All of which the court refused to give, and thereupon gave the following instruction upon its own motion:

"If from the evidence the jury find, that beyond the limit of a reasonable time for the delivery of plaintiff's cattle at Union Stock Yards at Chicago, Illinois, the Wabash Railway Company, negligently delayed said delivery and thereby directly caused pecuniary damage to the plaintiff in the disposition of said cattle, the jury will find for the plaintiff, and in default of such finding they will find for the defendant."

This was a correct declaration of the law of the case. It was manifest by the evidence that the plaintiff in error had contracted to carry and deliver the cattle from Stoutsville to the Chicago Union Stock Yards, and that it made its own arrangement

with the Wabash Company to complete for it its further transportation of said cattle beyond the terminus of its road at Hannibal.

It was clearly shown that there existed between the Missouri, Kansas & Texas and the Wabash Railways the closest and most intimate shipping arrangement, that by previous agreement the M., K. & T. had a right to contract, and did contract shipments over the Wabash road. There was shown to be a joint service at the outer depot at Hannibal and that the Yard Master (Henwood) was in the joint service of the two roads; that they had an agreement and arrangement by which they apportioned the charges of transportation; that he (Henwood) while employed and paid by the M., K. & T., had the right to order engines from the Wabash shops at Springfield, Illinois, to carry the M., K. & T. freight from Hannibal to Chicago; that when he was notified by the M., K. & T. from Sedalia that he would notify the Wabash at what time he would start the Wabash train from the termination of the M., K. & T. road at Hannibal; that he (Henwood) had control of making up the Wabash trains at Hannibal and starting them out on their journey to Chicago; that he made up this stock train carrying plaintiff's stock and started it on its journey over the Wabash railroad to Chicago. (See pages 45 and 52 of transcript of the record.)

Hence it was apparent, both from the terms of the contract and the oral evidence introduced at the trial, that the plaintiff in error had constituted the Wabash Railroad its agent to complete the contract of shipment, and it was not thereupon entitled under

the instruction of the court to be released from its acts of negligence and the court properly so instructed.

Indeed, would it not be a seeming abandonment of a fixed purpose upon the part of the courts, to thus permit these carriers, by such system of contract jugglery to circumvent the long established policy of the law not to allow them toply their vocations as common carriers without at least assuming responsibility for their negligence in so doing, as well as responsibility for the negligence of those whom they employ? Such has never been the holding of this court nor the recognized doctrine of this country, as declared by the Supreme Courts of nearly, if not quite all, of the states in the Union. How, therefore, can a statute, whose only effect, as declared by the Supreme Court of Missouri, is to avoid an attempted release from liability for negligence in the performance of a duty which the carrier has by contract assumed and undertaken to perform, be held invalid? How can it be said to be unconstitutional and void in the sense that it undertakes to regulate commerce among the states? The court below did not so construe it. We do not believe that this court will so hold.

III.

There should be no difference between counsel for plaintiff and defendant in error and no room for any argument before this court concerning the liability to which carriers are heid under the law declared by the Supreme Court of the State of Missouri. In that state the law has long been settled, and that too, in harmony with the general law of liability, as decided by the majority of the states of the Union, and in practical harmony

with the law as declaoed by this court. The law as declared in that state, in the absence of a contract of carriage, holds the carrier to its common law liability for negligence over its own line of road. But that the carrier may stipulate for a limitation of its responsibility, so far as it is an insurer, against loss by mistake or accident, but it cannot exempt itself from losses caused by a neglect of that degree of diligence which the law casts upon it, or from its character of bailee. In an early and well considered case the Supreme Court of the State of Missouri, speaking through Judge WAGNER, in the case of Levering, etc., vs. The Union Trust Insurance Co., 42 Mo. 83, says:

"The argument in favor of the right of the carrier to vary his liability by introducing a condition into its acceptance is founded on a misconception, in considering that its *liability* is voluntary and arises *ex contractu*. The law attaches the responsibility to his employment or calling; and, if he assumes the calling, he has no power over the *duties* which the *law annexes* to that calling. His assuming the character of a common carrier, depends entirely upon his own will, or assent; but, if he undertakes the occupation, the liability which comes upon him, in respect to the goods brought or borne to him, to be carried, are imposed by law and not created by assent or agreement."

This equitable and just doctrine is carried to its logical effect through all the subsequent decisions of that court, and will be adverted to hereafter in connection with the contract of shipment in this case. This was the rule and law of liability before the enactment of Section 944, of the Revised Statutes of State of Missouri, in controversy. Of course this liability only extended to its own line of road. When, therefore, it had delivered the goods to its next carrier all duty of carriage ended, and, therefore, all liability for such carriage ended. It could not refuse to carry the goods over its own road but was bound

by law to receive and carry them, because it had held itself out as a public carrier over its road; and, having voluntarily assumed this character, the law imposes the duty to carry, and the liability of such act of carriage to the end of its road. Therefore, in the absence of any contract made by the carrier, by which it undertook to perform the office or function of a carrier beyond its own line of road, there was no further duty or obligation resting upon it beyond its said line. Under the law of the State of Missouri none was fastened or attempted to be fastened upon it. But in the case of Loomis vs. The W. & St. L. & P. Ry. Co., 17 M. A. 350, it was said by Phillips, P. J.:

"We may concede the proposition that a common carrier is not ordinarily bound to carry freight beyond the terminus of its line of transportation, but the law is equally well settled that it may by contract extend its undertaking to deliver beyond its terminus."

Now, while the carrier is not bound by law to carry, or contract to carry beyond its terminus, it is equally well settled that it is not prohibited by law from entering into such a contract or undertaking. So, in Missouri at least, there is no doubt that it may undertake the duty and assume the obligation to carry beyond its own line. But may it undertake this duty and assume the character of a common carrier and at the same time avoid liability therefor? Can it by agreement reap the advantages of a contract to carry beyond its own road and avoid the liability which attaches to such an undertaking? When it voluntarily agrees to become a carrier over another road can it avoid the liability which the law inseparably attaches to the duty it thus assumes? In the concise language of Judge Wagner, quoted *supra*, this question is answered:

"The law attaches the responsibility to his employment or calling and if he assumes the calling he has no power over the duties which the law annexes to that calling. His assuming the character of a common carrier depends entirely upon his own will or assent, but if he undertakes the occupation the liabilities which come upon him are imposed by law."

It is the contention of defendant in error in this cause that when the carrier undertook by written contract to carry to Chicago, a point admittedly beyond its own line, it thereby forever put it out of its power to limit its liability to its own line, either in the same or any other contract; that in securing the advantages of a through contract it lost its immunity from liability beyond its road between the points it had assumed to carry. True it was not bound to contract beyond its line, neither was it prohibited from so contracting. But having so contracted, though not previously bound, it then became bound by its contract and it cannot then limit its liability for negligence for its own acts. If it has made the connecting carrier its agent to complete its contract of carriage, it cannot then escape the liability for the act of negligence of its agent employed to complete its undertaking. In other words, its indefeasible liability for negligence is coextensive with its liability to carry, whether such obligation to carry arises from law or is assumed by contract. If we follow this well established principle of law it clears away all difficulties in this case. The law says in effect:

You must watch for yourself. If you bind yourself by contract to carry beyond your own road then the law will follow you, like a shadow, with the same indefeasible liability, to so carry without negligence; and while you may limit yourself from common law liability on the connecting carrier's road over which you

agree to carry, you may do so only to that extent which you could limit your liability upon your own road. You cannot by any devise, directly or indirectly, in the same, or, any other contract limit your liability against the negligence of the agent you employed in such further transportation and your attempts to do so will be void."

Therefore, when the carrier assumed the obligation to carry beyond its line of road *eo instante* the law fixed its liability. Such was the law of Missouri as declared in the case of Dimmitt vs. The Kansas City, St. J. & C. B. Ry. Co., 103 Mo. 441, where the constitutionality of the statute, involved in this case, was called in question and decided by the court. The court in that case say:

"At the time of its enactment [meaning the statute in question] the law was as well settled as now that a common carrier may *contract* to carry to a place beyond the terminus of his route, and *thereby render himself liable as such for the whole distance.*"

How can language be more plain and unambiguous than this? By the very act of contracting to carry to a place beyond the terminus it *thereby renders itself liable* for the whole distance. Such ruling is in harmony with an unbroken line of decisions of that court. Can it, therefore, be said, consistent with reason and the law of Missouri that, because the carrier is not bound by law to carry beyond its road, it may, by a mere declaration to such effect, end completely all liability at the terminus of its road, while in the same instrument, by which it assays to end its liability, it may yet in set terms reap the rewards and benefits of a further undertaking to carry to a point beyond its line and be relieved from all liability in performing such undertaking?

IV.

But, there is another view of the case, which in our former briefs we have barely adverted to, and which, upon closer examination, seems to be conclusive of the rights of the parties, irrespective of the interpretation of the statute, which will, in our opinion, lead to the determination of this contention in favor of the defendant in error. It rests upon sound and well established principles of law, and arises alone from the interpretation of the contract by the application of well known rules of construction. The first rule invoked is, that the contract must be construed most strongly against the carrier. The second rule is, that the contract must be so interpreted as to beget harmony and avoid a conflict among its several clauses. The third rule is, that, even in jurisdictions where the policy of the law permits the carrier to contract against liability for the negligence of itself, or its agents, such contract, to have this effect, must be a contract against *negligence in express terms*, and must be in plain, clear and specific language. In other words, (says Hutchinson on Carriers, Second Edition, Paragraph 262.)

"The exemption from liability for negligence must be expressed by the use of the word [negligence] itself, or of something equivalent, and in construing the terms of such contracts, where the claim is, that such exemption is agreed to, the words will be taken most strongly against the party whose language they are and who is in an advantageous position for dictating the contract."

The same author, at paragraph 270, continuing the discussion of the subject says:

"Hence, where the agreement between the common carrier and the owner provided, in general terms, that the goods were

to be transported at the owners risk, it was held that the owner assumed the risk arising from the ordinary damages of transportation by the means employed which the reasonable and ordinary care of the carrier might be insufficient to prevent; but that the carrier was still liable for losses occurring from damages which ordinary care and prudence might have avoided, so, also the exception in the carrier's receipt of liability for loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from *any other cause whatever*, was held not to exempt from liability for losses or damages occurring from its own negligence, or that of his servants. The court remarking that, the terms of these contracts are very much under the control of the carriers and they may justly be required to express in plain terms the entire exemption from which they stipulate. The language of this clause is broad; but if it be desired that a clause shall cover losses by negligence it is not too much to say that the purpose must be clearly expressed."

Now, that the Company did not use the word "negligence" itself, is clear from an inspection of the language; nor did they use any equivalent expression. And the court in construing the language used in the thirteenth clause of this contract, which declares "The party of the first part shall be released from *liability* of every kind after the stock shall have left its road," will construe it only to mean, *all liability as an insurer*, after the stock shall have left its road, and *not all liability from negligence*. This construction will carry out the original agreement between the parties in harmony, and not in conflict with the law, and, also consistent with the undertaking of through carriage as expressed in the outset. And in considering and construing the latter part of said clause, where the language used is "the understanding of both parties hereto (being) that the party of the first part shall not be held or deemed liable for anything beyond

the line of the Missouri, Kansas & Texas Railway, excepting to protect the through rate of freight named herein," the court will construe the same in connection with the language employed in the latter part of the fourth clause in said contract, which, after enumerating the various liabilities from which it is to be released, concludes with this language: "*or any other causes except the negligence of the party of the first part, and said negligence is not to be assumed but to be proved by said party of the second part.*

Now, when these clauses are thus construed together and construed so as to harmonize and not conflict with each other, it is clear that the exception mentioned in the fourth clause, namely, "except the negligence of the party of the first part," will by the court be read into the latter part of the thirteenth clause so that said clause will be read in harmony with the exception mentioned in the fourth clause. Said clause, when so interpretated, will read as follows:

13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad, the said party of the first part shall be released from all liability [as an insurer] of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto [being] that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas Railway excepting to protect the through rate of freight named herein [except the *negligence* of said first party and said negligence not to be assumed but to be proved by the said party of the second part.]"

This construction is a necessary one in order to preserve harmony among the clauses and prevent a conflict in the lan-

guage in which it is written. And that, too, without thus far invoking the rule of construction that the contract shall be most strongly construed against the carrier, and, when this further rule is invoked, it seems clear and conclusive that the carrier has not in this contract, either in express or any other terms, even contracted against the negligence of the Wabash Company, but, on the contrary, it expressly provides that it shall be liable for such negligence, in the fourth clause *supra*.

V.

In their reply to defendant's answer, the plaintiffs in the court below denied the consideration in the contract, and the alleged release from liability, as in the answer specifically pleaded, and declared the same was void and against public policy. The plaintiffs below in their evidence (introduced without objection on the part of defendants) proved conclusively a total lack of the alleged consideration; and, that the said 17 1-2 cents, the alleged lower rate, was in fact the usual and only rate at said date from Stoutsville to Chicago, Ills. This was testified to by the Plaintiff Smizer and Mr. Tulley. Although these facts were peculiarly within the defendant's own knowledge, and denied in the reply, they offered no evidence to show that the same were reduced rates, as alleged in said contract, or that they had any other or different rates than the rates given plaintiffs, or that plaintiffs had any option concerning rates at all. And it is fair to presume that if the same were not the usual and only rates, but were in fact reduced rates, given in consideration of the various releases from their common law liability as carriers, then the defendants would have so shown, as it could have

so shown, if the recitals in the contract had in fact been true and that the same was, in reality, and not merely in recital, an honest, upright and true consideration for all the limitations and avoidances of every obligation known to the law by which the duty and liability as common carriers is so unalterably fixed. It is indeed unknown to plaintiffs by what occult force of secret magic this etherial consideration (existing only in naked recital) is made to support the ponderous weight of the innumerable releases from responsibility, which the law, in wisdom, has interwoven into the very fabric of their existence as common carriers. We cannot believe that courts will lend their aid or sanction to such artful subterfuges which open the highway to fraud, injustice and oppression. Yet such is the cunning devise by which they expect to play the game of "fast and loose" with the shipper, and "hide and seek" with the courts.

It was the appellant's clear intention in this contract to reap every advantage from its contract of through shipment, and, at the same time, to so limit their liability as to shirk every duty they owed to him as a common carrier.

It is likely that neither respondent nor any other shipper ever reads these outrageous contracts. It is certain, if they did, they could not grasp their legal import. Such contracts are nothing more nor less than shrewdly and ingeniously constructed pitfalls by a school of able corporation lawyers who are constantly remodeling their snares and revising their forms to comply with every utterance of a court made in their favor. An intelligent, just and exhaustive review of such contracts and the inequality of the contracting parties is found in the opinion of *Mr. Justice* BRADLEY in the ably decided case of Lockwood vs.

The Railroad Co., 84 U. S., 946; 17 Wall. 485. And so by repeated decisions of this and other appellate courts the shipper is bound by their every valid provision. But the court will only uphold such contracts when fairly and honestly entered into for a valid consideration, and will then construe them most strongly against the party whose real contracts they are, and in whose interest and behalf they are made. The record in this case expressly shows a total absence of the consideration for the alleged release by the shipper of the carrier's liability.

Hutchison on Carriers, Sec. Ed., 261.
Levering vs. Union Transit & Irs. Co., 42 Mo., pp. 92 & 93,
and many other authorities familiar to the Court.

If the shipper is bound, by the through contract, the carrier is, for a stronger reason, likewise bound. Can it be said that the cogent and conclusive reasons that have persuaded and impelled courts to uphold these contracts at the instance of the carrier, are impotent and ineffectual when evoked by the shipper? Most certainly not. Appellant will not be permitted to play a game of "Heads, I win, and tails, you lose." Appellants are not infants nor wards of the court, and if they have spread a net for respondent's feet and have become caught in its own meshes, their cries will not be heeded.

Doubtless the plaintiff in error is amply protected under its contract with the Wabash for all loss it may be required to pay on account of the default and miscarriage of that company. Even if they were not, it would be no reason why they should not be compelled to respond in damages in the sum awarded plaintiffs

and for which they have steadfastly refused to make reparation. The plaintiffs are therefore in this court seeking, not to enforce their own, but appellant's bond. There was a through contract. There was no contract for release of liability for negligence. There was no consideration for the alleged release. There is admitted negligence upon the part of the Wabash Co. The judgment was for the right party. The amount recovered is just and reasonable. There was no error in the court's instructions, and the judgment should be affirmed.

Respectfully submitted by,

J. H. RODES,
R. B. BRISTOW, and
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Attorneys for Defeudants iu Error.

No. 11.

Reply Brf. of Rodes for D. C.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
WILLIAM McCANN AND MILTON B. SMIZER, PARTNERS, UNDER THE NAME OF McCANN & SMIZER.

No. 161.

In Error to the Supreme Court of the State of Missouri.

SEPARATE ARGUMENT IN REPLY TO THE ARGUMENT OF PLAINTIFF IN ERROR.

By J. H. RODES,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Plaintiff in Error, vs. WILLIAM McCANN AND MILTON B. SMIZER, PARTNERS, UNDER THE NAME OF McCANN & SMIZER.	No. 161.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SEPARATE ARGUMENT IN REPLY, BY J. H. RODES, FOR DEFENDANTS IN ERROR.

A reasonably careful analysis of the very elaborate argument of the plaintiff in error will not fail to discover a method of argument, by no means devoid of tact; a faculty which, though rare and valuable in an advocate, seems little adapted to the enlightenment of a court, which must measure accurately

both premises and the conclusion and again weigh both by the crucial test of pure logic and abstract reason. As much zeal seems to be employed in arguing from a false as from a true premise, and the argument is only rendered in a measure plausible from an adroitly concealed fallacy which doubtless the court would detect without aid, but which we feel constrained to endeavor to point out in the following

REPLY TO THE ARGUMENT OF PLAINTIFF IN ERROR.

We will first discuss the third point in counsel's brief in which the law is stated in two paragraphs, the first of which is as follows:

"III.

"In the absence of the statute in question, the carrier could lawfully contract against liability for loss or damage occurring on a connecting line, or occasioned by the negligence of a connecting carrier."

Certainly this proposition, as stated,is true, and the authorities cited in support of it are not questioned, but no conclusion can be drawn from them supporting the contention of the plaintiff in error, in the case at bar, for the proposition as above stated and the authorities cited, do not apply to a case like that under consideration.

Under this proposition counsel cites Hutchinson on Carriers, Sec. 149-b, where the rule is stated by the author as follows:

"The liability of the carrier beyond the terminus of his own route being thus a matter of contract, it is clear that he may pre-

vent all question of his liability by an express contract excluding it, and that such a contract will be enforced, even in those states where the rule in the Muscamp case prevails."

After stating this rule in the above language, this author cites in support of it as the leading cases, Myrick vs. R'y Co., 107 U. S., 102; Ill. Cent. R'y vs. Franklinberg, 54 Ill., 88; and Berg vs. R'y Co.. 30 Kan., 561.

Now, since the Myrick case is elsewhere liberally quoted from by counsel in his argument as supporting his right to make and enforce the contract made in this case, we will pause to consider what is there decided and differentiate it from the question now before the court. (1) The court decided upon the evidence that the carrier had not, in fact, contracted *to carry* the goods from Chicago to Philadelphia. The court says: "The receipt does not, on its face, import any bargain to carry the *freight through*. It does not say that the freight is to be transported to Philadelphia or that it was received for transportation there. It only says it is *consigned* to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And adds: 'Marked and described as above for transportation by the Michigan Central R'y to the warehouse at—— leaving the place blank. * * *. It cannot be assumed by the court, in the absence of evidence on that point, that it was intended for final destination of the cattle. On the margin of the receipt was the following: '*Notice*—see rules of transportation on the back hereof.'

"And among the rules is one declaring that the goods consigned to any place off the company's line, or beyond it, would be sent forward by the carrier or freightman, when there are such, in the usual manner, the company acting for such purpose as the agent of the consignor or consignee, and not as carrier, and the company would not be responsible for any loss, damage or injury to the property after the same should have been sent from its warehouse or station.

Though this rule, brought to the knowledge of the shipper,

might not limit the liability imposed by a specific through contract, yet, it would tend to rebut any inference of such a contract from the receipt of the goods marked for a place beyond the road of the company."

Thus, while it is seen that this case supports the doctrine announced in the first paragraph of point III on p. 11 of counsel's brief, and is also supported by the rule announced in Hutchinson on Carriers at Sec. 149-b, as cited by him, yet, neither the law as announced in the brief, nor the authorities cited thereunder, either support, or pretend to support, the proposition for which he is contending in this case.

No one can seriously deny that the carrier can lawfully contract against liability for loss or damage occurring on a connecting line, or against the negligence of a connecting carrier, and may do so in Missouri as freely as elsewhere, notwithstanding the statute; but, that is not the proposition here under consideration.

The question at bar is, can he by contract at once bind himself to the duty of carriage over the line of his connecting carrier and at the same time lawfully contract against liability over the line where he has undertaken to carry?

It is readily seen that these are two widely different propositions, resting upon entirely different principles, and concerning which directly opposite conclusions must be reached.

Thus, only by stating a part of the proposition involved, is counsel able to find authority in their support If the exact proposition involved had been stated, the very authority relied upon would have struck down the contention sought to be maintained in this case, for the court clearly intimates, that this rule

which declared a limitation of liability for loss or damage after the same had been forwarded, although brought home to the knowledge of the shipper, might not limit the liability imposed by a special through contract.

Again, Hutchinson on Carriers cites in support of the text, Ill. Central R'y vs. Frankenberg, 54 Ill., 88, and Berg vs. R'y Co., 30 Kan., 561.

In neither of which cases was there any contract by the receiving carrier to carry beyond its own road.

In the latter case the opinion of the court is rendered by Mr. Justice Brewer, then Judge of the Supreme Court of Kansas, where, there was not only no pretense of a through contract, but an express statement that the company would only carry over its own road and deliver to the next carrier for them to deliver to destination; and it was expressly stated that the company would not be responsible as a common carrier beyond its line. The court in the course of the opinion, remarks: "It will be borne in mind there is no express agreement to transport to Chicago," and that, as a matter of course, might, in all such cases limit liability to its own road.

So, also, the proposition of law announced in the second part of point III on p. 11 of counsel's brief, is but a horn-book principle of the law of carriers; and, yet, the principle is so stated as to seem, at first glance, to give some warrant of authority for the position for which counsel is contending; while the principle itself, and all the authorities cited in its support, manifestly, only relate to the duty and liability of carriers beyond their road, in those cases only, where the carrier has not by contract obligated himself to carry beyond his road.

None of them go to the extent of saying, or intimating, that the carrier does not become a common carrier beyond his road where he undertakes by contract to extend his duty and obligation of carriage over the road of the connecting carrier. The principle and the authorities cited only hold that a carrier is not a common carrier beyond his road, because he owes no duty or obligation by law to carry the goods beyond his line; but, it forms no warrant for saying that he is, or may become, a mere private carrier for hire beyond his own road, where he by contract, assumes an additional obligation of carriage which the law has not fastened upon him. For, when he assumes by contract to extend his functions as a carrier, and reap the advantages and receive the reward of a carrier beyond his line, he is then a common carrier over such other line, and if he reaps the rewards, he can not escape the burdens of a common carrier.

From the proposition as stated under point III, which is not denied; a specious, illogical and wholly false conclusion is reached by counsel on bottom p. 35, where he says:

"The fact that the transportation beyond the carrier's own line does not result from the operation of any general rule of public law, the fact that he is not required against his will to undertake the transportation beyond his line, shows that he is not a common carrier in the strict sense of the term. The test laid down to distinguish between a common carrier and a private carrier for hire is that the latter may undertake the transportation, or not, as he desires.

"This is the privilege of a carrier beyond his own line, and establishes his relation to such transaction as that of a private carrier for hire. The private carrier for hire is but a bailee for hire and as such is only liable for negligence; that is, for failing to exercise that degree of diligence which is required of him. If he is not negligent he is not liable, and, yet, it is well settled

that the bailee for hire may contract against such liability even to the extent of removing it entirely."

The vice of this argument is manifest in this; that when the carrier assumes the duties and obligations by a contract of extended carriage beyond his line, he thereby imposes upon himself by contract the very duty over such other line, which the law, from considerations of public policy, has imposed upon him over his own road. And, while by the general law he is not a common carrier over the connecting carrier's line, because he owes no duty of such carriage, and is not bound, by operation of law to carry over such other line; yet, if he voluntarily contracts such additional obligation of carriage his *employment* is also changed. His *identity* is then changed by the functions which he has assumed. He is performing by agreement the office of a carrier over another road. His employment is the same now, as that which he was before exercising over his own road; he is receiving the same compensation; he has secured all the rights and benefits and endowed himself, by contract of carriage with all the functions and characteristics of a common carrier; and the law then says, "You are now, by reason of the functions assumed, *common carrier*, and you can not perform the office of a public carrier and avoid the liabilities which such an occupation imposes; neither can you change your identity by a contract, or a mere declaration, that you are not a common carrier; nor, can you alter or change the obligations resting upon you as such common carrier by a contract that you will not be liable as such so long as you exercise the functions."

In other words, the character of the employment is not to be tested, determined or ascertained by the mere de-

clarations which the carrier may make regarding the limit which he undertakes to place upon his liability, either upon his own or any other road, but his character is determined by the functions he performs, or which he assumes to perform in relation to the public carriage of goods.

The nature of the business he undertakes determines whether or not he is a common carrier.

To briefly sum up the whole argument, the law fixes his relations as that of a common carrier over his own route, and while he may modify his common law duties and by contract limit his liability over his own route, still, he is none the less a *common carrier*, although he may expressly stipulate (as he has done in the first one of the fifteen release clauses in this contract) that his "liability shall be that of a private carrier for hire."

So, also, though he is not in general acceptation of the term, a common carrier beyond his line, and is not made so by law, and owes no duty to carry goods beyond the terminus of his route, yet, he is not prohibited from undertaking to carry the goods to a point beyond his own line and over the route of another carrier, and may contract to do so, and thus bind himself to deliver goods to their ultimate destination. But when he enters into such a contract and undertaking, and accepts compensation therefor, is he not exercising the same functions beyond his road which the law requires him to perform upon his own line? Is he not then, indeed, a common carrier beyond his line by reason of his own undertaking and the voluntary occupation he has thus assumed? Will, therefore, the mere declaration upon his part, that he is not a common carrier, or, that he will not assume the duties as such, operate to change his nature, or the nature of the

business upon which he has embarked? Most certainly not. The only reason ever assigned, or that could be assigned, for permitting the carrier to limit liability to his own road is because he is not bound by law to carry beyond his road, but the very minute he obligated himself to carry beyond his road *eo instanti* the law fixes his liability.

Lawson on Contracts states the rule as follows: "The law attaches his responsibility to his employment or calling, and if he assumes the calling he has no power over the duties which the law annexes to his calling. His assuming the character of a common carrier depends upon his own will or assent; but if he undertakes the occupation, the liabilities which come upon him in respect to goods brought or borne to him to be carried, are imposed by law, and not created by assent or agreement."

Therefore, when he undertakes by special agreement to carry goods beyond his line he is a common carrier beyond his line, and his liability in such cases has been frequently declared by the courts and announced by all the leading text writers.

The rule is thus stated by Lawson on Contracts at p. 350, Section 332.

"In this country it is held that a common carrier may limit his responsibility as an *insurer* by special contract but that he can not by any contract exempt himself from responsibility for the consequences of his own negligence or for the negligence of his servants or agents. Contracts of the latter character being void because they are against public policy and because they are supposed to be obtained under circumstances which gave to the carrier an undue advantage in obtaining terms which the law can not enforce without giving sanction to fraud or oppression."

So, also, Beach on Modern Law of Contracts, Vol. I, Sec. 611, states the law as follows:

"A common carrier has power to make a contract beyond the terminus of his route and thereby render himself liable for

the whole distance. When a carrier contracts to carry goods to a point beyond the terminus of his own line, and there deliver them, (such is the contract at bar), he is liable not only for his own negligence but, also, for the connecting carriers throughout the entire route. The connecting carriers are, in such cases, regarded as his agents, for whose acts he is held responsible."

Ray on Negligence of Imposed Duties. Freight Carriers, p. 394, Sec. 99, states the law as follows:

"Railroad companies, unless forbidden by their charters, have the power to contract for shipments the entire distance over any connecting lines. The contracting carrier is liable upon other lines as upon its own."

Lawson on Contracts of Carriers, Section 235, states the rule fully as follows.

"A common carrier has power to make a contract to carry to a place beyond the terminus of his route and to render himself liable as such for the whole distance. All connecting carriers in such case become his agents for whose negligences or other defaults he is responsible, and he has no more power to evade by contract the consequences of their negligence than he can the results of his own."

In the light, the law thus well settled, both by sound reason and authority, it would seem to be little less than folly in counsel to zealously contend for a doctrine at variance with both logic and sound reason and unsupported by authority outside of one or two jurisdictions in the United States, and which this court has expressly disapproved and refused to follow, or to recognize as just in practice, or sound in principle and opposed to public policy, and this court expressly held in R'y Co. vs. Lockwood, that it would not enforce that portion of the contract of the carrier which stipulated for exemptions from liability for negligence of his servants, although the contract was made in

New York with a New York corporation, where such contracts had been held valid.

And, in Michigan Cent. R. R. Co. vs. Myrick, 107 U. S., 102, this court decided that what constitutes a contract of carriage is not a question of local law upon which the decisions of the state courts must control, but that such contracts were matters of general law upon which the United States Supreme Court will exercise its own judgment.

It is, indeed, asking this court to make a feble surrender of a long established and just policy, to mere importunity, without sound precedent or authority, and to announce a doctrine at variance with justice, at war with reason and condemned by experience, and to turn these quasi public institutions loose, unfettered and unrestrained, to make any contract they please, whereby they may ply their avocations and contract to carry goods over other lines, and over the lines of other carriers, by land or sea to the remotest parts of the globe, and divest the shipper of any control, care or custody of his goods, or the right to make his own arrangements with connecting lines; to demand and receive compensation for through rates and charges for through carriage, and, in the very instrument by which they enlarge their scope of operation and sphere as a common carriers, divest themselves by contract from all liability which is so indissolubly attached to the very occupation they thus assume.

Such a rule of law would render it far more profitable for the carrier to carry over other lines than over his own. He could contract and receive compensation to carry anywhere, over lines of insufficient and irresponsible carriers, and employ negligent, careless, inadequate

and insolvent agents and other public or private carriers and end all liability when the goods had left its line of road. To open such inviting field of operation and undertaking to railroads and express companies, that have become recognized monopolies in the function of carrying goods and property, without at the same time holding them responsible, at least, for the *negligence* of those whom they employ and pay to complete their contracts of shipment, would we say, be but to surrender the rights of the shipper, which it has been the uniform policy of the law to uphold and protect, to the insatiate greed and avarice of the quasi public institutions that are forever insidiously encroaching upon well defined rights and prerogatives under the ancient rules of law.

It would be but to abandon the shipper to the wiles and artifices of shrewd and competent, if not subtle and crafty agents, willing and eager to over-reach him in the matter of securing terms for their employers, armed in every instance, as in the case at bar, with already drawn and printed contract, carefully prepared by the best legal talent which they are able to secure, every clause of which is drafted, so far as the law will permit, to secure immunity, or avoid responsibility upon the part of their principals.

The court will not fail to note that at the very outset of this contract among the *rules and regulations for the transportation of live stock*, that it is recited:

"No agent or receiver of this railway has any power or "authority to bind the receivers in regard to the shipment of "live stock, except by written contract in the following form."

That is, the form in which this contract is written.

It is apparent, therefore, that these shippers were compelled to execute this contract in the entirety or make no contract at all.

It is but just, therefore, that courts should scrutinize these contracts, which are ex parte in form and in fact, and declare void and inoperative, those parts which attempt to relieve the carrier from liability which public policy forbids they should escape.

Our duty would not be fully discharged toward our clients or the Supreme Court of Missouri if we omitted to give a short analysis of our understanding of the opinions of the court in the cases, Dimmitt vs. R. R. Co., 103 Mo., 59, and McCann & Smizer vs. Eddy, Mo., now under review, where the statute in question is interpreted and its office is separately declared and its function assigned in reference to each of those two cases. Especially does this seem to be necessary in view of the ingenious attempt upon the part of the adverse counsel, who by quoting from parts of the latter opinions, seeks to place the decision in conflict with the federal constitution. While we conceive the attempt to be wholly impotent and abortive in the light of the full text of the decision which is before this court, it still remains a duty incumbent upon us as counsel to elucidate, so far as we are able, the language of the Supreme Court of Missouri, and to lend to this court any aid in our power in enabling it to arrive to a clear and perfect understanding of what was decided in each of these opinions.

We need not dwell longer upon Dimmitt case than to call attention to the wide difference in the facts of the two cases. In the Dimmitt case there was no express undertaking on part of the carrier to carry the goods to

the point of ultimate destination, nor was there anything contained in the bill of lading there under consideration indicating either an intention to limit liability in its own road, or to limit its duty of carriage to its own road, but the carrier had simply issued a bill of lading to a point beyond its road—in the following form:

MARKS AND CONSIGNMENTS.	NO. PKGS.	ARTICLES.	WT.
J. W. McAleer, Deadwood, D.T. via. Ft. Pierrie. Acc't—Dowerty & Co.	1	Box Cigars. Stamped, corded, Sealed.	200

Now it was conceded by the Supreme Court of Missouri, that prior to the adoption of the statute, by reason of the Supreme Court of Missouri having adopted the American rule of construction, that this bill of lading, in the absence of other satisfactory evidence showing to the contrary, would be only an undertaking upon the part of the carrier, to transport the goods to the end of its line and there, by delivering to the connecting or forwarding carrier, end its liability; and, therefore, would, in that case, in the absence of the statute referred to, have held that such was the limit of their *undertaking* and therefore the limit of their liability; but, the Court there held that the purpose of the statute 944 referred to, was to adopt, in this sort of a case, the English rule of construction in Missouri as distinguished from the American rule, and that by the English rule of construction, thus adopted, such a bill of lading as this, would, in the absence of any limitation in the bill itself, or from other evidence showing to the contrary, be construed by the court to be a *through undertaking* by the carrier. In deciding this case the court used the following language:

"This *prima facie* case the statute makes for the plaintiff on the facts stated."

It is apparent that this is as far as the court needs to have gone in deciding this case, and that the balance of this paragraph is mere *dictum*, decided to be such by the court in the case at bar, and was only entitled to a place in the opinion to illustrate that the carrier under the statute had a right to make any valid contract it chose, relative to its duty or liability, and that the English rule did not place any limitation on the right of contract by the carrier, thereupon stated the substance of the English rule in the following language:

"In order to defeat it [this *prima facie* case made by the statute] the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, or, what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line."

This was a fair statement of the English rule, a correct declaration of the law and a proper limitation when applied to the *Dimmitt case*, for in that case, as already shown, there was no express contract or undertaking upon the part of the carrier to transport the goods beyond its line, whereupon the carrier might have very properly said in this bill of lading: "It is expressly understood that in receiving the package we will only carry the same to the end of our road and there deliver it to the connecting carrier to complete the shipment", or what would have been equivalent, in the Dimmitt case, as stated by the court, it might have made a specific agreement that it was to be liable only for loss or damage on its own line; for, by such language or agreement, in this bill, it would have negatived any

intention that it had attempted, or undertaken a through carriage of the goods; it would have thus overcome the presumption that it was a through carriage. It would have defeated the prima facie made by the statute that it was a through undertaking upon the part of the carrier, and the court would not, thereupon, have held it liable for anything beyond its road, because it would not have deemed it to have undertaken to transport the goods beyond its line.

But, in the Dimmitt case, there being no limitation upon its contract of carriage, and nothing to negative its intention to carry the goods to their destination; no agreement that it was only liable for loss or damage occurring on its own line, and having received the goods to be *transferred* and *delivered* to a point beyond its road, it was, by reason of the English rule of construction, which the statute had adopted, deemed to be a through contract upon the part of the receiving carrier, and, for that very reason, and that alone, it held the carrier bound for the negligence of his connecting carrier which it employed to complete its contract.

So, in the case at bar, the court holds the receiving carrier bound for the negligence of its connecting carrier, and agent, because, and only because, *it has undertaken a through contract of carriage*. Here the court finds, not *a mere receipt* or bill of lading naming a point of destination beyond the route, but an absolute agreement, in good set terms, by which it assumes the duty and asserts the right and privilege of carrying the goods, for an expressed consideration and through rate, from the point of shipment to its ultimate destination. A court need not here resort to any distinctively American or English rule of interpre-

tation to find the scope of this undertaking, for it is alike, definite and certain by the plain rules of contract. It is open, plain and undisguised in this respect.

Ah, but plaintiff in error says:

"In the Dimmitt case the court used this language: In order to defeat it (meaning the *prima facie* case made by the statute) the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its line, or *what is equivalent*, that there was a specific agreement that it was to be liable only for loss or damage occuring on its own line."

Gathering inspiration from this utterance, the plaintiff in error evidently reasoned thus: "that since the Supreme Court of Missouri has decided that a contract or agreement limiting liability to the carrier's own road, *is equivalent to a contract* only to carry to the terminus of its road; therefore, an instrument can be drawn by which we may make any contract we please with the shipper, and by simply using somewhere in the agreement the magical phrase, that "*we are only to be liable for loss or damage occurring on our own road*," then the contract (no matter what other contradictory language, or inconsistent declarations it contains) will, *thereby*, be instantaneously transformed into a contract *only to carry to the end of our own line*, and the court, by reason of its language quoted in the Dimmitt case, has promised to so declare."

Here, then, they reasoned, is an open door through which we may enter into a widely extended and unlmited field of operation as a carrier beyond our own road, and at the same time avoid all liability on account of our undertaking. Here in Missouri, at least, they had found a royal road, an *open sesame*, by which they could circumvent the policy of the law and become carriers beyond their road, and could, therefore, contract with the shippers to transport him and his goods to any point within, or without, that state, and over the line or

lines of any number of intermediate common carriers by land or sea, and avoid all liabilities for its negligence and the negligence of the agents employed for this purpose. Such was evidently the inspiring hopes which led to the drafting of the present contract at bar.

But, did they correctly interpret the language of the court; and did not the court only mean to say, that a clause limiting liability to its own road, *was only equivalent to an express contract to carry to the end of its own road*, only in a case like the one then at bar, where the carrier *had not in express terms undertaken to carry to a point beyond its terminus*, as in the Dimmitt case? This question remains alone to be answered by the Supreme Court of Missouri in the decision of the case now before this court, the full text of the opinion being found at page 82.

We need not dwell upon the fact whether or not the statute is unconstitutional as construed in the Dimmitt case, for two reasons, first, that that case is not before this court, and, second, because it is not contended by the plaintiff in error that the statute, as there interpreted is in conflict with the constitution. And, yet, the same general interpretation of the purpose of the statute as declared in the Dimmitt case, is followed in the case at bar. Its meaning and function as there declared are not changed, nor its office enlarged, further than to render it applicable to the altered state of facts which this case at bar presents.

Let us consider in detail the opinion of the Supreme Court of Missouri in the present case, and especially the mission it assigns to the statute to ascertain if the complaint has any just foundation in fact, or whether the statute, as there construed

and applied to the fact before the court, constitutes any limitation upon the right of the carrier to make any lawful, valid and binding contract it chooses to enter into between itself and the shipper; or, whether it interferes in any way, or places any restrictions upon the power or right which the constitution alone vests in Congress to regulate commerce among the states.

In arriving at the determination of this question, this court will follow the interpretation of the statute which the Supreme Court of Missouri has placed upon it, since that court, alone, has the right to construe the meaning of the statutes of its own state.

This court will not adopt a construction of its own, nor a construction contended for by counsel for plaintiff in error, at variance with the construction placed upon it by the Supreme Court of Missouri; even though this court should believe that the construction adopted by that court is at variance with the legislative intent.

Therefore, with the language of the statute itself, or the meaning of the language, or with the legislative intent, this court will exercise absolutely no concern, further than to ascertain the intent and the meaning of the statute as ascertained and declared by the Supreme Court of the State of Missouri; and, unless the statute as construed and interpreted by that court should clearly violate some constitutional prerogative reserved alone to Congress, this court will not interfere, with the judgment rendered by that court.

The statute is as follows:

"Sec. 944. *Liabilities of Common Carriers.*—Whenever any property is received by a common carrier to be transferred from

one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

The court, in its opinion, on page 84 of the transcript of the record, then proceeds as follows:

"This section was construed by the court in the Dimmitt case "(103 Mo. 440) and its application to the contract there in "question was determined. In that case it was held that the "intent of the statute and the evident purpose was, to apply to "common carriers the English rule of duty and liability in re- "spect to the carriage of property beyond their own route, as "distinguished from the American rule which was at the time "recognized as the law of this state."

In that case (Dimmitt case) the goods were assigned to a point beyond the route of the receiving carrier, and there was no express limitation by the contract not to carry to their destination.

"This ruling was in accord with the decision of the English "courts, but under the law as it existed prior to the statute, "upon the facts shown to have existed, the receiving company "would not have been liable for the loss."

Because the bill of lading alone upon its face, under the American rule, would not have been evidence of a contract to carry beyond the receiving carrier's own line, and would not have made even a *prima facie* case. But the court continues:

"There is no doubt the statute, by its very terms, has the "effect of applying the English rule so far as it makes the re- "ceiving carrier responsible for the defaults of other carriers "through whose *agency it undertakes to complete the contract of "carriage*. This is as far as the decision in the Dimmitt case "goes.

"But, the statute can only be held to adopt so much of the "English rule as is consistent with it. It cannot properly be held "to abrogate the existing law of the state unless inconsistent with "it. The statute engrafted upon the law of the state, as it then "existed, makes the rule by which we must be governed. The "English law does not make it.

"To the extent then that the statute declares the English "rule, the decision of the English courts would be authority for "it's (the statute's) interpretation, but they would not be author- "ity where the statute and the English rule conflict. The stat- "ute must be interpreted in the light of our own law, and, as "far as possible, in conformity with it."

After quoting from a part of the decision in the Dimmitt case the court says:

"The law as stated (in the Dummitt case) is within the "terms of the statute *and is inconsistent with the law of this state*, "as, previously declared by this court. (Citing Coates "vs. Express Company, 45 Mo.,238,Snyder vs. Express Com- "pany, 63 Mo., 376."

In both of these cases, and many others, the Supreme Court of Missouri has clearly held that where the carrier's contract of carriage bound it to carry the goods beyond its own line, it thereupon became liable for the *negligence of the agents it employed to complete* its contract of carriage. The court proceeding in its opinion says:

"The provision of the statute is that 'whenever property is "received by a common carrier to be transferred from one place "to another.' This language does not restrict, but rather recog- "nizes the right of the carrier to limit its contract of carriage to "the end of its own route, and there deliver the property to the

"connecting carrier. There can be no doubt then, that under "the statute, as well as under the English law, the carrier can "by contract, limit his duty and obligation to carriage over its "own route."

Now we wish to pause here, to comment for a moment upon this language of the court. The court in saying that "This language of the statute does not restrict but rather recognizes the right of the carrier to limit its contract of carriage to the end of its route and there deliver it to the connecting carrier," does not mean to imply thereby, that the *statute forbids*, or in any way restricts its making a contract also of carriage beyond its road. This right has always been recognized by the courts of Missouri both before and since the enactment of the statute. The only question in the mind of the court is the effect of such contracts when so made, and especially the construction that should be placed upon them by reason of the rule of construction adopted by the statute in question. Therefore, in order to differentiate between the decisions of the English courts, which permit the carrier to end all question of liability beyond his road by a contract limiting liability to loss or damage occurring on his own road; and the rule of liability as declared by the statute under discussion, the court says:

"But it seems that under the decision of the English courts, "the carrier can also limit his liabilities to loss or damage "occurring on his own route, by specific agreement that it "should only be so liable.

"In the Dimmitt case the English rule was stated to its "full extent, *though unnecessary to the decision in that case;* "there having been no attempt to make such a limitation.

"While, under the decisions of this court, it has "been held that a carrier could by contract limit his common

"law liability as an insurer, it was before the statute, and has "since been uniformly held that he could not by contract, or "otherwise, relieve himself from liability for loss or damage oc- "casioned *by his own negligence or that of his agents or employes.*

"Such was the law when the statute was enacted. "There is nothing in the statute that indicates an intention "to change it. Indeed, it seems to be recognized by the statute, "for the statute by its terms only declares a liability for loss or "damages occasioned by *negligence.*"

Wherefore, the court says:

"The *dictum* of the court to the effect that an agreement "that a carrier should only be liable for loss or damage occur- "ring on its own line, *is equivalent to an express contract to carry "the property only to the terminus of its own line*, can not be "taken as the law of *this case where there is an express contract* "for a *through carriage, and also an agreement for non-liability.*"

Such was not the meaning of the court and its language was not applicable except in a case like the Dimmitt case where there was no express contract entered into.

The court continues:

"Where the original undertaking is in doubt *such an agree- "ment might be evidence* of the intention of the parties in respect "thereto. This question is not involved here and need not be "decided.

"We cannot, therefore, give such an interpretation to the "statute as would permit the carrier to contract for a through "shipment and at the same time exempt himself from liability "on account of the negligence of connecting carriers. Such an "interpretation would in effect operate as an appeal of the vital "provisions of the law which declares conclusive liability in such "cases.

"The statute does not undertake to change the law in "respect to liability of a carrier for his own negligence, but to "extend it to connecting carriers as well, and declare a liability "for negligence without regard to which is in fault."

Let us suppose that Section 944 in the place of being ex-

pressed in the language of that section, was expressed in the following language:

"Whenever property is received by a common carrier in this state without any conditions, contract or limitations whatever; to be transferred from one place to another, whether such place to which it is to be transferred be within or without this state, the carrier so accepting such goods, shall be deemed to have undertaken to become a carrier of the goods so received to the place to which it has received them to be transferred—or whenever any common carrier issues a naked receipt or bill of lading in this State to a certain point named in said bill of lading or receipt, without any limitations of liability or without limitation upon its obligation of carriage, such initial carrier shall be presumed to have undertaken to transport the goods to such point named therein; and in case any common carrier within this State binds himself by contract to carry goods over the lines of other carriers, railroads or transportation companies, it shall be liable, not only for its own negligence, but also for the negligence of other carriers whose agencies it employes to complete its contract of shipment."

Could the statute in this language be said to be unconstitutional for the reason suggested in the assignment of errors? Could it be that such statute would be in conflict with the Federal Constitution or to impose any restriction or limitations upon interstate commerce? The carrier is thereby left free to make any contract he may choose, which is not void as being against public policy. It only prohibits him from contracting against his own negligence or the negligence of his agents. He is neither prohibited from nor required to carry, or contract to carry, goods beyond his own line. He may end all question of his liability beyond his own line by limiting his contract of carriage to his own line, but if he extends his contract of carriage beyond his own line, he can not limit his liability for negligence in such

case to his own line, for the law holds him to responsibility for the negligence of his agents as well as his own negligence. A statute imposing such duty upon a common carrier could not be a restriction, or limitation upon the power of Congress to regulate interstate commerce; it is only declaring a rule of liability arising from certain contracts, which the carrier may, or may not, enter into, it only imposes upon the carrier the same liability for the negligence of the agents it employs in transporting beyond its road, which the law from considerations of public policy imposes upon all common carriers in transportation of property over their own lines, though they may extend into other states."

This court will observe that the Supreme Court of the State of Missouri has placed a construction upon Section 944 in question, as if it were expressed in the identical language in which we have supposed it to be written. In constructing the statute it has adopted an interpretation of the legislative intent in harmony, and not in conflict with the Federal Constitution. Such is a well known rule of construction of statutes. This court will adopt no other interpretation of the statute than that construction which the Supreme Court of Missouri has placed upon it, and when this court is satisfied, as it seems to us it must be, in this case, that there is absolutely no conflict, in fact, between the statute as it is thus construed and the Federal Constitution, the judgment of the Supreme Court of Missouri will be unanimously and cheerfully affirmed.

Perhaps we will be pardoned for farther trespass upon the time of the court to call attention to the error that was committed by the court in its first opinion rendered by Judge Sher-

wood, which led to a rehearing and reversal of the case by the court in *banc*.

Strange to say, the court in that opinion so misconstrued that clause in the contract "releasing the company from all liability after the stock left its road," as to extend it to a release from its through contract of carriage which it had already entered into, when, as a matter of fact, upon a closer examination the court discovered that the clause did not purport to release the carrier from its contract to carry the stock to its destination, but only from the liability which should come to it for such carriage beyond its road.

This came about by the judge who wrote the opinion following the dictum of the court in the Dimmitt case, that seemed to declare that a contract limiting liability to the carrier's own road would be construed as only an undertaking to carry to the end of its road.

Therefore, the court in the first opinion construed this contract to be only a contract to *carry* to the end of the line of the plaintiff in error, and not as a through contract. This was an error so manifestly opposed to the plain terms of the contract, that the court, when its attention was directed thereto, could not permit to stand.

But the Honorable Judge who wrote this opinion, having fallen into this error, and decided that the M., K. & T. Railway Company had only contracted to carry the goods to the end of its line, thereupon based his subsequent opinion upon this erroneous conclusion, thus, the language of that opinion is only applicable to a case where the contracting carrier has not bound itself to carry further than the end of its route.

There is nothing said in that opinion that could not be endorsed by this court or the Supreme Court of Missouri as the law applicable to this case, *if* the learned Judge was right in his construction of the extent of the duty of carriage undertaken in the contract.

That he was wrong in such construction of the extent of the obligation seems to us to be beyond controversy, and in this we are supported by all the rest of the six members of the Supreme Bench of Missouri. In the light of this explanation we approve the utterance of Judge Sherwood in the first opinion of this case as fully as does counsel for plaintiff in error. But there can be little significance attached to it in this case, for the very reason that the law as there announced, applies to the different state of facts, if, as we contend, this is a through contract of shipment.

Certainly, therefore, if the contracting carrier had not undertaken a through contract, then the learned Judge was right in saying:

"*If* the statute under discussion is to be construed *literally; if* it is to be *interpreted* as casting on one railroad company the burden of *negligence* of another railroad company, *against whose negligence the company sued has explicitly contracted, as in the present case, then* I have no hesitancy in saying; I do not believe that the legislature has the power thus to interfere with the right of a railway company to contract, speaking in a general way, as it may deem fit." * * * *

Moreover, *if* Section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of interstate commerce, and, therefore, under the prohibitions of the Federal Constitution."

It is evident, we say, that the learned Judge was only declaring that the statute *would* be unconstitutional if it was to be

construed literally, that is, if the statute should be so construed as to fasten an obligation upon the receiving carrier to answer for the negligence of all the carriers that came after him in a shipment where he had not only, not undertaken to carry beyond his own road, but had expressly contracted against the negligence of those who should undertake, for the shipper, the further carriage of the goods beyond the line of the initial carrier.

Certainly, if the statute should receive such a construction as this, it would have been *arbitrary*, tyranical and unjust, as well as unconstitutional, and would not have been upheld by any member of the Supreme Court of Missouri. But, that no such function has been assigned to the statute, is *too* plain to admit of any argument, in the face of the following language of the Supreme Court in *banc* in deciding this case:

"The statute *merely* prohibits a carrier, *who, by contract,* "*undertakes to transport* property to a point *beyond* its route "from relieving itself of responsibility for *neglect* to properly "perform its duty. It *only* imposes the duty and liability which "the law, from consideration of public policy, imposes upon all "common carriers in the transportation over its own line, al- "though they may extend into other states."

Judge Sherwood, who wrote the first opinion, did not mean to say that the statute would have been regarded by him as unconstitutional under such a construction as this, but would have expressly held that it was not unconstitutional if assigned no greater function than to make it liable for its own negligence or that of its agents, since the judge said in that very opinion:

"Of course, as against its own negligence, a corporation "would not be allowed to contract: this would be subversive of "public policy, and, besides, would be an abdication of the "duties and functions as common carrier which, by the very

"terms of its charter, it would not be allowed to abdicate or ab-
"rogate."

Therefore, if the judge had construed this contract as a through undertaking he would have either commended the office assigned to the statute, or would have held without regard to the statute that such a contract was void as against public policy.

And so, also, undoubtedly, the entire Supreme Court of Missouri would have held that the contract at bar was void as against public policy, even in the absence of the statute declaring such liability. Indeed the Supreme Court of Missouri had, before the enactment of the statute, in the case of Holliday vs R'y, 74, Mo., 162 (a case that arose in 1875, while this statute was not enacted until 1879) expressly held under a similar contract to the one at bar, that where the contract of shipment was for the entire distance the carrier "could not stipulate for exemptions from all liability beyond the terminus of his line." There is therefore, no foundation for the statement of counsel for plaintiff in error on page 26 of his argument:

"That there is no difficulty, therefore, in reaching the conclusion that but for the statute in question, the courts of Missouri would have held that it was competent for the plaintiff in error to have limited the liability in the manner attempted in the contract in question."

Such is not true in fact, as already seen by the former holding of that court. The statute simply declared a rule of liability, just and reasonable in itself; one in conformity with the general law of liability of carriers, in such instances, which had been adopted by the Federal, and nearly all the State courts, and especially by the Supreme Court of Missouri; it simply an-

nounced a rule that was against the public policy of the law to permit the carrier to violate.

We submit, therefore, that the statute as construed is in no way violative of any constitutional right, state or national, and that the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

J. H. RODES,

Attorney for Defendant in Error.

No. 11.

Brief (reply) of Rodes for D. C.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Filed Nov. 7, 1898.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

NO. 11.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, . . . Plaintiff in Error.

vs.

WILLIAM C. McCANN and MILTON D. SNIZER, Partners under the name McCANN & SNIZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

REPLY OF DEFENDANT IN ERROR TO ADDITIONAL ARGUMENT OF PLAINTIFF IN ERROR.

By J. H. RODES,
For Defendant in Error.

Sedalia Ptg. Co.

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The additional argument for plaintiff in error filed in this cause is confessedly subtle and ingenious, but when weighed, analyzed and tested by the final analysis it must undergo, before being sanctioned and approved by this Court, we believe its specious-

ness will be discovered and its falacy detected. It can not ultimately avail counsel either intentionally or through over zeal to misconstrue or misrepresent the holding of the Supreme Court of Missouri; yet, that such misrepresentation is the result of the effort of counsel for plaintiff in error, we believe we can conclusively show in the following reply to, "Additional Argument for Plaintiff in Error." Observe—

First. It best suits the purpose of counsel for plaintiff in error to dissect out from the body of the opinion of the Supreme Court of Missouri, in this case, isolated paragraphs, which, being separately and alone considered apart from the body of the opinion, seem to give colorable grounds for the conclusion which is sought to be drawn, but when read and analyzed in connection with the full text of the opinion, and in the reflected light of the former adjudications of that court, no such inference is warrantable, as we shall presently show.

Will this Honorable Court take note at the outset *that before the enactment of the statute of Missouri* complained of, and therefore without reference to it, and independent of it, in the case of Halliday vs. Railway Company, 74 Missouri, 162, the Supreme Court of Missouri held that: "*When a carrier undertakes to transport to a point beyond the terminus, beyond its own line, or to a point not on its own line*, it will be responsible according to the terms of its contract of shipment, *if it* contained no *prohibited exemption, for loss or injury occurring upon the connecting lines, as well as its own line?*"

In the face of this positive utterance of the Supreme Court of Missouri, directly to the contrary, and admittedly, before the statute was enacted, does it not seem as unwise, as it is unfair

and misleading, for counsel for plaintiff in error to assert and persistently contend before this court "that, *but for the statute complained of, and but for the power derived therefrom, there would have been no liability in the case at bar.*"

In the case above cited, which was exactly like the one at bar, where the initial carrier had contracted to *carry to the destination* which was beyond its line, the court expressly said, at page 160 of above cited opinion: "*As the contract of the plaintiffs with the receiver was for the entire route* (so in case at bar), *he, the receiver* (as in this case), *could not stipulate for exemption from all liabilities beyond the terminus of his line.*" So, whatever shall be the opinion of this Court, it must not be based on the assumption that the liability in this case is created by the Statute, and it must recognize the fact that if the Statute were extirpated, liability would have existed under this contract, and would have been declared by the Supreme Court of Missouri, and that too, independent of the Statute.

The plain truth is: that the Statute, in the place of being interpreted as extending and enlarging, much less creating a non-preexisting liability, of the carrier is, as interpreted and construed by the Missouri Supreme Court, made to recognize the right of the carrier to *restrict and limit the liability as an insurer for the entire route over which they contracted to carry*, but not to release itself from the *negligence* of its agents and only to forbid the carrier by contract or otherwise, to relieve himself from loss or damage, occasioned by his *own negligence*, or that of his agents or employees. (See language opinion on page 85 Abstract.) Continuing,—

The Court says: "Such was the law (mark the expression,

"*the law*") when the Statute was enacted. There is nothing in the Statute that indicates an intention to change it (*the law*), indeed it (the law) seems to be recognized (by the Statute), for the Statute by its terms only declares a liability for loss or damage by *negligence*."

"We cannot, therefore, give such an interpretation to the Statute as would permit a carrier *to contract for a through shipment and, at the same time, exempt himself from the liability on account of negligence of connecting carriers.*" Note that the Court says: That the initial carrier cannot exempt itself on account of the negligence of connecting carriers, *only in a case where it has made a contract for through shipment.* And why? Because plainly, the Court holds as it had held before, such connecting carriers, in such instances are the agents of the Receiving Carrier, employed and paid by the original contracting carrier, to complete for it, the initial carrier, its contract for through carriage. The Court holds that to permit them to contract, in instances where they had undertaken through carriage, for immunity from liability beyond its road, would be, to permit the carrier to relieve itself from the consequences of the negligence of its agents; for, in such case, the receiving carrier, by its contract, undertakes and voluntarily binds itself *to transport and deliver* to place of ultimate destination.

The Court concludes this paragraph of the opinion thus: "Such an interpretation (of the Statutes as that contended for by counsel for the Company, *i. e.*, that it may contract for a through shipment and undertake itself to ship and deliver goods to a point beyond its line and employ and pay one or many connecting carriers to complete its undertaking, and at the

same time exempt itself from liability on account of the negligence of connecting carrier), would, in effect, operate as an appeal of the vital provisions of "*the law*" (not the Statute, as counsel contends), which declares conclusive liability in such case." Let us ask the court to look at the meaning of the phrase, "*the law*," as here used. We contend that it means the law of this Court as previously declared, in the many cases cited. The Court had early said in this opinion (bottom page 84, Abstract), "The Statute must be interpreted in the light of '*our own law*,' and so far as possible, *in conformity to it.*"

The Court had previously said in the opinion (113 Orig. paging abs) that: "The law as stated (in the Dimmitt case) is also *within the terms of the Statute* and is inconsistent with '*the law*' (mark the expression here, 'the law') of this state as *previously declared by this Court*," citing Coats vs. Express Co., 45 Missouri, 238: Snyder vs. Express Co., 63—376. In each of these cases the Court held, that if the carrier contracted to carry beyond its road, it was liable for the *negligence* of the agents it employed to complete its undertaking: hence, the Court says, for it (the Court) now to adopt, as it is asked to do, such a construction of the Statute as would *permit the carrier to contract for through carriage and at the same time relieve itself from the negligence of the agents it employed to complete its undertaking*, would be to adopt a construction that would operate as a repeal of the vital provisions of "*the law*" (of Missouri) which declares *conclusive liability in such case.* For to do so, the Court would not be adopting a construction of the Statute in conformity with our own law.

The Supreme Court had early said, through Judge Wagner in Levering vs. M. T. Ins. Co. 42 Missouri, 88. "The law attaches the responsibility to his (the carrier's) calling and if he assumes the calling, he has no power over the duties which the law annexes to that calling. If he undertakes the occupation, the liabilities which come upon him are imposed by law." Hence, the Court held here: that when the Receiver of the M., K. & T. undertook to carry those cattle to Chicago, not merely to the end of its line, and deliver to the connecting carrier, it had then undertaken the duties of *a carrier and not a forwarder*, and could not release itself from the liability for the negligence of its agent, the Wabash.

The Court continues: "The Statute does not undertake to change the law in respect to the liability of a carrier for its own negligence but to extend it to connecting carriers as well (where it employs them as agencies in completing contracts undertaken) and to declare a liability for negligence without regard to which is in fault."

If there be any doubt between counsel as to what the Court meant, would it not be fair to let the Court itself explain the concluding language (at 115 Orig. paging abstract), where it says: "The Statute merely prohibits a carrier, who by contracts undertakes to transport property beyond its own line, from relieving itself from responsibility for *neglect* to properly perform that duty."

It only imposes the duty and liability which "the law" (mark the expression "the law") from considerations of public policy imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other states."

When it comes to a last analysis, the Supreme Court of the State of Missouri holds, that the Statute of Missouri simply held that the effect of the Statute, was only to prevent the carrier by contract to relieve itself from its common law liability, as it had been declared to exist in Missouri. However, ingenious the attempt of counsel to make it otherwise appear, there is no doubt of this as disclosed by the concluding words of the Court, where it cites, Hart vs. R'y Co., 69, Iowa, 490, as authority for its holding. The Statute is simply a rivet, as it were, to the law as formerly declared. In effect, the Statute says to the Court: "You shall not permit these carriers to change, by contract, their common law liability as heretofore declared to exist by this Court."

The Statute is a mandate to the Court saying: "If the carrier wants to reap the benefit of a contract to carry the goods to its destination beyond its line, you must not relax the rule of law already established by this Court, which holds the principal liable for the negligent acts of its agents. If the carrier wished to reap the benefits of a through carriage, it must bear responsibility for the negligence at least of the agents it employs to complete its undertaking. It does not undertake to prevent, and does not prevent the carrier from issuing a through bill of lading providing it states in such bill of lading that it undertakes to carry the goods only to the end of its own line, and there deliver to the next carrier to complete the shipment. In the Dimmitt case there was a *through bill of lading* but there was no express contract for through carriage, as in the case at bar, that the receiving carrier would *itself transport and deliver at ultimate destination*. Therefore, the Court in deciding the present case, says

that if the carrier had in the Dimmitt bill of lading declared that, "it was to be liable only for loss or damage occurring on its own line," it might have been evidence of the intention of the parties only to carry to the end of their road. But the Court says, that that question is not involved in this case and need not be decided, because the receiver has in express terms, agreed and undertaken to carry the goods to destination.

Let us now examine this case in the light of the opinion of this Court in the recently decided case of Richmond & Allegheny R. R. Co., vs. Patterson Tobacco Co., 169 U. S., 311. from which counsel in his additional argument filed herein, affects to draw consolation, and by legal craft, rather to be admired than condemned, seeks to convert into a suggestion of authority for his contention. There is nothing in that opinion that warrants such claim or presages such a conclusion. The opinion of the Court, in this case, while it is clear and discriminating, seems purposely to avoid any intimation to prejudge the case at bar, which having been argued, must have been in the mind of the court. This can forebode no evil results to defendant in error and is only evidence of refined discrimination and an evident purpose of the Court to decide *only such questions as that case presented* and to leave the Court free to hear and determine the case at bar on its own merits. Counsel for plaintiff in error contends that the Statutes in Virginia is widely different from the Missouri Statutes. In language, —yes. In judicial constructions with which alone the Court will deal, there is a most marked similarity. Both the Virginia and Missouri Courts recognize the dominant power of the Federal Constitution, vesting in Congress alone the right to

regulate commerce among the states, and manifest a jealous intention to guard with profound respect the prerogatives conferred. Such has been the uniform purpose of the Supreme Court of Missouri, where it has repeatedly held Missouri Statutes unconstitutional, where there was any real or apparent conflict with the rights guaranteed carriers under the Federal Constitution (see Stanley vs. R R., 100 Mo., 435; Grimes vs. Edd., etc.; 126 Mo., 168, and many other cases). On this very account, the reasoning of the Missouri Supreme Court and the conclusions reached is entitled to much consideration and careful analysis, before being branded with such insubordination. Although feeble, perhaps, has been the defense of that Honorable Court against this arraignment and vigorous and ingenuous its prosecution, still, we confidently believe that this Honorable Court will not misunderstand or misinterpret the meaning and language of the Supreme Court of Missouri; and to, this end, may we urge the Court to carefully analyze for itself all the Missouri Court has said in the case in addition to the Dimmett case, 103 Mo., 433; Coates vs. Ex. Company, 45, 238; Snyder vs. Ex. Company, 63, 376; Sewing Machine Co. vs. R. R., 70, 672, and particularly, Halliday vs. R. R. Co., 74 Mo., 162, where the right to limit liability to its own road in through contracts, was discussed and determined against the carrier before the Statute was enacted, together with what faint light counsel for defendant in error has been able to reflect in his several briefs and arguments filed herein, and determine for itself if any prerogative of Congress has been brushed aside or infringed upon in even any remote sense. The Court will observe that counsel for plaintiff concedes at the bottom of page 9 of his additional

argument that "the decision in the Virginia case (which was approved by the Court) puts the subject in much the same situation in which it was left by the decision of the Supreme Court of Missouri, in the Dimmett case, 103 Mo., 433." Indeed, later on in same paragraph, counsel says: "As there interpreted, the Statute did not, in any manner, restrict the right of the carrier to limit liability to its own line." Certainly not, neither does the case at bar, unless the carrier by voluntary contract enlarges his obligation and duty of carriage by specifically entering into a definite undertaking upon its part by which it agrees to become a carrier beyond its own line, or to become a carrier over all intervening lines between point of shipment and ultimate destination.

The Court did not need to invoke, *and did not invoke the aid of the statute* to determine what the undertaking of the carrier was in this case, because it was not in doubt. The Court did not mean to intimate in the Dimmett case that the carrier could agree and undertake a through shipment and also avoid the liability for the negligent acts of its agents on the other lines it employed to complete its undertaking. On the other hand, the Court said at the outset in the Dimmett case: "At the time of its enactment (meaning the Statute) 'the law' *was well settled as now*, that a common carrier may contract to carry to a place beyond its route, *and thereby render himself liable as such for the whole distance*." i. e.—If it undertook a through carriage by special contract, it must answer for the negligence of the agent it employed in completing its agreement. It did not mean, as already shown, that it could reap the rewards of its through agreement without being responsible for the

negligent acts of the agent it employed to do the work it had undertaken to perform. In the Dimmett case, mark you, there was no evidence of a through contract except from the fact that the goods were billed to a point beyond its road. The carrier, although it had issued a bill of lading, did not in express terms undertake to carry and deliver to point of destination. And the Court held that by reason of its so issuing its through bill of lading and placing no limit upon the extent of its duty of carriage, it was presumed just as in the Virginia case, having accepted for transportation the goods directed to a point of destination beyond its own line, to assume thereby an obligation for its safe carriage to its point of destination. But in Missouri, when it is ascertained as a fact by satisfactory evidence that the carrier has undertaken to carry to destination, whether by aids of the Statutes or from the express terms of its agreement, it cannot limit liability to its road; in other words, it cannot avoid liability for the negligence of its agents. Mark you, in the Virginia case, the carrier expressly stipulated that "it should only be liable for the *transportation* of the goods over its own line, and beyond this to be responsible *solely as a forwarder*, that is to say that all its obligations should be considered discharged, if it safely *carried the goods over its own line and delivered them to the connecting carrier.*"

If the carrier had seen fit to place such a limitation upon his undertaking in the *Dimmett* case or in the case at bar, although it might have issued its through bill of lading as in the Virginia case, there would be no pretense under the law, as declared by the Supreme Court of Missouri, that there was any liability beyond its own line of road, because it would not have

been deemed to have undertaken to carry beyond its road, and its liability would have ended with its duty to carry But in the case at bar the carrier is not willing to end its contract and duty of carriage with the end of its road, but seeks to extend, and by contract in express terms, does extend that duty and obligation of carriage *over the entire distance*, and does employ and pay the intervening carriers to act as its agent in the completion of the contract, but seeks to *avoid responsibility for the negligent acts of the agent it employs*.

The Court holds the carrier is not only prohibited from doing this by the Statute referred to, but that "the law," irrespective of the Statute, from considerations of public policy, likewise prevent the carrier from such exemption from liability, and the Court had so directly declared, as already seen, in Halliday vs. Railway Company, cited supra.

It is not denied that the Court holds that the Statute has the effect of preventing the carrier by contract, from limiting liability to his own road where it undertakes to become a carrier beyond its road. But this is the very head and front of its offending. No more, no less. And, if this is treason against the rights and prerogatives reserved to Congress and an unwarranted interference with the rights of the carrier, under the Inter-State Commerce Act, then, of course, it is within the province of the Court to deal with the Statute as it shall see fit. But, if the Court should hold that the Statute as construed is unconstitutional, for the reason assigned, then it would seem the Court must remand the case to the Supreme Court of Missouri to determine whether or not liability exists under the laws of the State of Missouri upon the contract independent of the aid of the Statute.

But, for the time, conceding that the Court arrives at its conclusion alone by aid of the Statute, and fixes liability against defendant for the negligence of its agent, the Wabash Railroad, and that too alone, on account of a liability which the Statute creates and imposes, and holds, that but for the Statute, no liability existed under the laws of the State of Missouri, or could exist, how would the cause then stand? And, could the Statute be justified under the arraignment of being unconstitutional? Certainly it could not be condemned under the holding and interpretation given it in the Dimmett case. This, defendant in error, expressly concedes, and this interpretation is approved by this Court in R. & A. R. R. Co., cited supra.

And the Statute, as there construed, is declared to be "no attempt to regulate and control contracts as to Inter-State shipments, but simply to establish a rule of evidence ordaining the character of proof."

We say that, thus far, the Statute is justified and approved by this Court, and needs no further comment. If, in the case at bar, there is any enlargement of its scope, it is only to the extent of holding that the Statute also prohibits a carrier in Missouri from contracting for a through shipment and binding itself to carry over other lines and avoiding liability for the negligent acts of the agents it (the contracting carrier) employs in completing its undertaking. We frankly say that if such is the holding of the Court, which for argument only we concede; and, if to establish such a rule of law, is an unwarranted regulation of Inter-State Commerce, then, and only then, must the Statute fall. This, it must be conceded, is a Missouri contract, there made and entered into, and there in part performed. The laws of Missouri

do not require the receiving carrier to undertake a shipment over other roads, or to a point beyond its own line; neither does it prevent the carrier from entering into such undertaking; therefore, if the carrier agrees to become a carrier over other roads and binds itself by voluntary agreement to assume a duty and obligation that the law does not impose, it evidently does so for its own advantage. And by doing so, thereby divests the shipper of any right to make its own arrangements with any intermediate carrier, and thereafter absolutely controls the destiny of the shipper and his goods, and he has, thenceforth, no further right and dominion over them. So far as it is thereafter in the power of the shipper to prevent, the contracting carrier might deliver the goods to incompetent and irresponsible agencies to complete a carriage for the shipper which it, the receiving carrier, had itself agreed to perform. Can it therefore be said to be unlawful or unjust to the carrier who makes such a contract for the Legislature to fix, in advance, the liability which will flow from the making of such an agreement? And, to say to the carrier: "That if you make such an agreement, and assume such an undertaking you shall, as such carrier, be bound to answer to the shipper for any loss or damage sustained by him on account of the negligence of the agencies you employ to complete the agreement you have made?"

Certainly after careful consideration and minute analysis of the subject, with a jealous intention to respect and guard the bounds set upon the State's authority, the Supreme Court of Missouri did not conclude, that such Statute was in any way in conflict with the commercial power of Congress prescribed by the Constitution, as the following language of the

Court clearly indicates. "We are unable to see, as contended by the defendant, that the construction we give to this Statute makes it repugnant to the provision of the Constitution of this United States, which gives to Congress, alone, the power to regulate commerce among the States.

"The Act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation between the States subject to Congressional regulations.

"The Statute prohibits the carrier who by contract undertakes to transport property to a point beyond its own route from *relieving itself of responsibility for neglect to properly perform that duty. It only imposes the duty and liability which the law*, from consideration of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may go into other States."

In reference to that portion of the Statute now under consideration, let us suppose that Statute had read as follows: "In every case where a common carrier voluntarily enters into a contract within this State by which it agrees and binds itself to carry goods or property of the shipper to a point of ultimate destination beyond its line of road and over the lines of other roads and transportation companies, either within or without this State, and in pursuance to the terms of such agreement and undertaking employs and pays other common carriers and intermediate transportation companies, whether within or without this State, to complete for its undertaking and agreement, and shall, in such agreement provide a clause exempting, or purport-

ing to exempt it from all liability or loss or damage occasioned by the negligence of said common carriers, or intermediate transportation companies thus employed and paid by it in the completion of its said undertaking, then, and in each such case such clause in its contract exempting it from liability for the negligence of such intermediate common carrier or transportation company, employed by it as its agent in the completion of its undertaking, *shall be null and void and of no effect as an attempt to release itself against liability of the negligence of its own agents.*" Such clearly is the additional interpretation given to the Statute in excess of what it was declared to mean in the Demmett case.

Would not such Statute be clearly within the police power of the State to regulate the management and operation of railroads and prevent them from releasing themselves from the negligence of their agents and be designed to protect property otherwise endangered by a relaxation of the rule of their common law liability? It says to these carriers, you may engage in the employment and embark in the business of carrying goods over other lines and into other States, or, even between continents if you choose, and you agree to transport by land or sea; you may employ and pay intermediate agencies and other carriers and transportation companies to complete, for you, your undertaking, but any contract you make divesting yourself of liability for the negligence of the agencies you thus employ in completing your contract, will be unavailing to you and void. Such a limitation would be void as against public policy, independent of the Statute. In Lockwood vs. R. R. Company and other cases decided by this Court it has been held that it was

against public policy to permit a carrier to exempt himself from liability from the *consequences of negligence of his agents or servants*. Now, whose servant and agent was the Wabash Company in the transportation of these goods? Confessedly the agent and servant of the plaintiff in error. It was the receiver of the M., K. & T. R'y Company that employed and paid the Wabash for its services and employed them to complete its undertaking. The Wabash Railroad was not the agent of these shippers. It had no contract or agreement or even bill of lading with the shipper. Defendants in error looked alone to the receiver of the M., K. & T. to do whatever was necessary to be done to deliver these cattle at the Union Stock Yards at Chicago, as it had agreed to do, with diligence and dispatch, and without delay. This was the measure of their agreement. No more. Nothing less. But plaintiff in error argues that it was not by law bound to become a carrier over other roads than its own, and is not, by law, made a common carrier over other roads than its own, and, therefore, contends that it may agree to carry over other roads and avoid liability for the negligence of the agents it employs for the completion of its contract and undertaking, and, therefore, may *avoid liability for the negligence of the other transportation companies by limiting liability to its own road*.

The answer to this argument, seems to be this:—

"True, you are not, in contemplation of law, a carrier beyond your line, and the law holds you only to the duty to carry goods over your own line and there deliver to the connecting carrier to complete the shipment to point of destination, but, the law *does not prevent you from undertaking to become a*

carrier beyond your own line, and you may therefore enter into an agreement by which you secure from the shippers the right to transport their goods *beyond* the terminus of your road *or over other roads* and over intervening carriers, to point of ultimate destination, and, by your contract, you may divest him of the right to make any other agreement with other roads. But, if you elect, as in case at bar, to contract to carry the goods over the line of other roads and enter into a solemn obligation and undertaking to do so, have you not, by this very election and agreement undertaken *the duty of a common carrier beyond your road?* And do not the same considerations of public policy now bind you to perform your additional undertaking, without negligence, over such other roads which bound you in the first instance over your own road?

In the first instance you are by law, bound to carry over your own road, which makes you a common carrier on your own line, though it may extend through many states. Where you voluntarily contract to carry over other lines, though they may extend into other states, you have voluntarily taken upon yourself, the occupation of a common carrier over other lines than your own.

The law will not permit you to enlarge the scope of your employment as a common carrier, and at the same time avoid the responsibility incident to the occupation you assume. The measure of your liability will not be relaxed when the scope of your employment is enlarged. If such rule is established and sanctioned by the Courts it will render it far more profitable for a common carrier to agree and bind itself to become a carrier over other lines than over its own. Under such a rule of law

common carriers would no longer agree to ship only to the end of their own road, but would, in all instances, enter into a contract and agreement, to ship and deliver the goods to point of ultimate destination. Any little belt line in the suburbs of a city, or miniature transfer or transportation company, would agree to ship goods to the ends of the earth, and divest the owners of all right or dominion over the goods, and be liable for nothing not occurring on their own road, however gross, or culpable, or irresponsible the agents they employed to complete their undertaking. Such, we say, would be the result of such a rule of liability. No, the law rather says to common carriers: "Your undifeasible liability for negligence is coextensive with your duty, and obligation of carriage, whether that duty arises from law, or whether you assume the duty by contract. If you, by contract, enlarge your duty and undertaking of carriage beyond your line, the law, which requires you to perform the duty *without negligence*, will follow you in your enlarged undertaking. If you employ other carriers to complete your expanded duty and self-enlarged obligation, they are your agents and not the agents of the shipper, and you can, in such instance, no more relieve yourself from the liability for their *negligence*, than you could relieve yourself from the negligence of your servant on your own road. So, at least, the Supreme Court of Missouri, had held, before the Statute was enacted. The effect of the Statute in question seems only to prevent the Court from relaxing this, their common law rule of liability as previously declared by that Court. In the recently decided case of Solen vs. Ry. Company, 69 Iowa, 490, cited by the Supreme Court of Missouri as a warrant for its authority in

this case, and, more recently, approved by this Court in 169 U. S., 133, in which it was held that, "A State Statute prohibiting contracts to exempt a Railroad Company from liability of a common carrier, is not, in any just sense, a regulation of commerce, or void, as to interstate business."

Mark you, the Missouri Court deals with the subject as a *through contract* by which the plaintiff in error *becomes carrier throughout the entire distance*. We trust we have been able in our several brief arguments to make our view of the case understood, and in some measure at least, become an aid to this court in understanding the position of the Missouri Supreme Court.

The rule of liability is wholesome and just, and works neither inconvenience nor hardship on the carrier, which by its traffic arrangements with the immediate carriers thus employed by it to complete its contract, is amply protected against loss or liability on account of their negligence. While on the other hand, if the shipper is left to grope in the dark and ferret out which particular road is delinquent, and that, too, without any of the facilities which the carrier has to ascertain these facts, he would be powerless, in the first instance, to locate the offending culprit agent of the original contracting carrier; and, in the second instance, if fortunate in this regard, might, and in many instances would be, compelled to maintain his suit (conceding there would be such privity of contract as would support his action) in a foreign state, remote from home and under such circumstances as would make it more profitable for him to suffer his wrong to go unredressed, than to pursue abroad such expensive and doubtful redress.

This court has often taken occasion to remark, notably in Lockwood vs. Co., supra, and to comment upon the wretched inequality that exists between these corporations and the shipper, and to point out the easy facility and the superior advantages the carrier has in gaining terms and contracts most favorable to itself. If, therefore, under color or pretense of this and like Statutes being in violation of the Federal Constitution, or in violation of the Interstate Commerce law, the carrier may strike down such a regulation as the Statutes of Missouri, and thereby secure the sanction of this, the highest Court in the land, permitting it to enlarge its obligation of carriage over other roads, and avoid all liability therefor, by a clause in the contract, limiting liability to its own road, after it has delivered the goods to the connecting carrier, then, indeed, the shipper will be at the mercy of the carrier, and the carrier thereby secure largely extended obligations and advantageous contracts without any corresponding liability.

We do not believe the Court can sanction or approve such a rule of liability.

Respectfully submitted,

J. H. RODES.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* McCANN.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 11. Argued October 11, 1898. — Decided May 22, 1899.

Section 944 of the Revised Statutes of Missouri of 1889, provided that, "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained." In commenting on this statute the Supreme Court of Missouri said: "The provision of the statute is that 'wherever property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier. There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit its duty and obligation to carriage over its own route." *Held*, That the statute as thus interpreted could not be held to be repugnant to the Constitution of the United States.

THE statement of the case will be found in the opinion of the court.

Mr. George P. B. Jackson for plaintiff in error.

Mr. J. H. Rodes for defendants in error. *Mr. R. B. Bristow* and *Mr. Charles E. Yeater* were on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

A statute of the State of Missouri, found in the Revised Statutes of that State, 1889, c. 26, reads as follows:

"SEC. 944. Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

Whilst this statute was in force the defendants in error shipped from Stoutsville in the State of Missouri, on the line of the Missouri, Kansas and Texas Railway, to Chicago, Illinois, which was beyond the line of that road, ninety-nine head of cattle. At the time of the shipment a bill of lading was delivered to the shippers. The portions of the contract pertinent to the questions here arising for consideration are as follows:

"This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that whereas the receivers of the Missouri, Kansas and Texas Railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof, as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stouts-

ville Station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:

"1st. That he hereby releases the party of the first part from the liability of common carrier in the transportation of said stock, and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive release, and does hereby release, said first party from any and all liability for and on account of any delay in shipping said stock, after the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent."

* * * * *

"4th. That the said second party for the consideration aforesaid, hereby assumes, and releases said first party from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property, from any source; failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any stock, overloading cars, fright of animals, or crowding one upon another, or any and all other causes except the negligence of said first party, and said negligence not to be assumed, but to be proved by the said party of the second part."

* * * * *

"13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part

hereby so expressly stipulates and agrees, the understanding of both parties hereto — that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas Railway, excepting to protect the through rate of freight named herein."

When this bill of lading was executed an ancillary agreement was indorsed thereon, as follows:

"We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass furnished us by the Missouri, Kansas and Texas Railway, Geo. A. Eddy and H. C. Cross, receivers, and of the other covenants and agreements contained in said contract, including rules and regulations at the head thereof and those printed on the back thereof, all of which for the consideration aforesaid are hereby accepted by us and made a part of this contract, and of the terms and conditions, of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employés of said receivers of the Missouri, Kansas and Texas Railway, for the purposes of said contract stated, and that we do agree to assume, and do hereby assume, all risks incident to such employment, and that said receivers shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employés.

(Signed) J. O. Richart.
M. B. Smizer."

The cattle were transported over the line of the Missouri, Kansas and Texas Railway to Hannibal, Missouri, and from that point the cars in which they were contained passed to the line of the Wabash Railway destined for Chicago. At or near Chicago an unreasonable delay was occasioned in the transportation of the cattle by the negligence of employés of the Wabash Railway, resulting in damage, for which the shippers subsequently brought an action against the receivers of the Missouri, Kansas and Texas Railway to recover for the breach

of the contract of shipment. Judgment having been entered upon the verdict of a jury in favor of the plaintiffs, an appeal was prosecuted by the receivers to the Supreme Court of the State, and was heard in division No. 2. There was a judgment reversing the lower court, and a motion for a rehearing was denied. Between the time of the decision of the Supreme Court and the overruling of the motion for a rehearing both the receivers had died, and the railway company had resumed possession of its road. This fact having been called to the attention of the Supreme Court, the railway company was substituted as appellant instead of the receivers, and a rehearing was ordered. The case was transferred to the court in banc, and was argued before that tribunal. Thereafter a decision was rendered affirming the judgment of the trial court, and motion for a rehearing was denied. 133 Missouri, 59. The case was then brought by writ of error to this court.

By the assignments of error it is asserted, and in the argument at bar it has been strenuously urged, that the Missouri statute above quoted is in conflict with the Constitution of the United States, because it is a regulation of commerce between the States, and that the Supreme Court of Missouri hence erred in giving effect to the statute in the decision by it rendered. The statute as interpreted by the Supreme Court is asserted to operate to deprive the railway of the power of making a through shipment of interstate commerce business over connecting lines, without becoming liable for the negligence of the connecting carriers. In other words, the argument is that the effect of the Missouri statute, as interpreted by the highest court of that State, is to deprive a railway company, transacting the business of interstate commerce, of all power to limit its liability to its own line, and, hence, compels it, if interstate commerce is engaged in or a through bill of lading for such traffic is issued, to become responsible for the articles carried throughout the entire route, thereby entailing upon the carrier receiving the goods the risk of negligence by other carriers along the line, even although such lines are situated beyond the State in which the contract was made or the business originated. This, it is insisted, is a direct

burden imposed by the State upon interstate commerce, since it forbids a carrier from engaging in that commerce, unless it subjects itself to a liability for the faults of others, against which it cannot guard and for which it was not previously liable, and, moreover, by necessary effect, punishes the carrier for issuing a through bill of lading for interstate commerce, thereby tending to discourage the through transportation of merchandise from State to State, and having a direct and inevitable tendency to defeat the portion of the provisions of the sixth section of the act to regulate commerce, as amended March 2, 1889, c. 382, 25 Stat. 855, referring to the subject of joint rate of tariffs over continuous roads of different carriers, and the seventh section of the original act, approved February 4, 1887, c. 104, 24 Stat. 382, which was designed to cause the carriage of freight to be continuous from the place of shipment to the place of destination.

The contention advanced in these several propositions is, however, without foundation, from the fact that it proceeds upon an erroneous assumption of the purport of the Missouri statute in question, since the Supreme Court of Missouri, in applying that statute in the case before us, has, in the most positive terms, declared that it was not intended to and did not prevent a carrier engaged in interstate commerce traffic from limiting his liability to his own line, and that far from doing this the statute left the carrier the amplest power to make such limitation in receiving goods for interstate carriage and in issuing a through bill of lading therefor. In commenting on the statute the court said:

"The provision of the statute is that 'wherever property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier.

"There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit its duty and obligation to carriage over its own route."

Again, in summing up its conclusions, the court said:

"We are unable to see, as contended by defendant, that the construction we give this statute makes it repugnant to that provision of the Constitution of the United States, which gives to Congress alone the power to regulate commerce among the States.

"The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States, subject to Congressional regulations."

The reasoning now relied on then is, that, although the Supreme Court of the State of Missouri has interpreted the statute of that State as not depriving a carrier of power, on receiving an interstate shipment, to limit its liability to its own line, this court should disregard the interpretation given to the state statute, by the court of last resort of the State, and hold that the statute means the very contrary of its import, as declared by the Supreme Court of the State, and upon such construction decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof. *Sioux City Trust Company* v. *Trust Company*, 172 U. S. 642, and authorities there cited.

It is urged, however, that even although it be conceded that the Supreme Court of Missouri has interpreted the statute in question, in an abstract sense, as not depriving a railway company of the power to limit its liability to its own line when receiving goods for interstate shipment, the court has nevertheless given the statute practical enforcement as if it meant exactly the contrary of the interpretation affixed to it. In other words, the proposition is, although the Supreme Court of Missouri has declared that the statute did not deprive a carrier of its right to limit its liability to its own line, yet it has, as a necessary consequence of its application of the statute to the bill of lading in controversy in this cause, given to the statute the very meaning which it expressly declared it

had not. An examination, however, of the opinion of the Supreme Court of Missouri demonstrates that it is not justly susceptible of the construction thus placed upon it. Analyzing the opinion of the court, it results that the court decided that whilst the statute left a railway company ample power to restrict its liability by contract, both as to carriage and as to liability for negligence, to its own line, the purpose embodied in the statute was to regulate the form in which the contract should be expressed, so as to require the carrier to embody the limitation directly and in unambiguous terms in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract, in order to reach a proper understanding of its meaning. That is to say, that the restraint imposed by the statute was not a curtailment of the power to limit liability to the line of the carrier accepting the freight, but a regulation of the form in which the contract having that object in view should be drawn.

Considering the statute as thus interpreted by the Supreme Court of the State of Missouri, it cannot be held to be repugnant to the Constitution of the United States. The subject of the power of the States to legislate as to the mere form of contracts for interstate commerce carriage was fully considered in *Richmond & Alleghany Railroad* v. *Patterson Tobacco Co.*, 169 U. S. 311. In that case the court said (p. 314):

"The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form, is as obvious as is the difference between the sum of the obligation of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown."

* * * * *

Of course, in a latitudinarian sense any restriction as to the

evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary."

But it is pressed that, conceding the statute to have the purport given it by the Missouri court, nevertheless it does not come within the rule announced in the case just referred to, because the requirement of the Missouri statute, as interpreted, is so unreasonable as to amount in substance to a denial of the right of a carrier to confine by contract his duty of carriage and his liability for negligence to his own line. If the regulation of the statute be equivalent to a denial of the right to so limit, this court, it is asserted, must consider its substantial results, and not its mere theoretical significance. This contention, however, is also without a solid basis to rest upon. The requirement as to form held to be valid in *Richmond & Alleghany Railroad* v. *Patterson Tobacco Co.*, *supra*, was that every contract confining the liability upon an interstate shipment to the line of the receiving carrier should be signed by the shipper or be invalid. The manifest intent of such a regulation was to protect the shipper, by having it clearly manifested by his signature that his attention had been directed to the contract limitation of liability, so that no question might arise of inadvertence on his part in delivering the merchandise and accepting the contract for its carriage, which is usually prepared by the railroad company receiving goods for transportation. Whilst differing in form of requirement, the exaction that the carrier, in unambiguous terms, in the portion of the contract acknowledging the receipt of the goods and expressing the obligation to transport, should state the limitation of his obligation as a carrier to his own line, but effectuates the purpose designed by the Virginia statute, which was upheld in the *Patterson case.*

If the bill of lading in the case before us did not contain a

positive statement of an obligation by the receiving carrier to transport from the point of shipment to the ultimate destination of the cattle, of course it would not come under the control of the statute. But as, on the contrary, the contract contains an expression of such obligation, limited by reference solely to subsequent conditions inserted in the bill of lading, it is plainly brought within the import of the statute as interpreted by the Missouri court. It would have been within the power of the receivers of the Missouri, Kansas and Texas Railway to have stipulated that the goods were received, to be transported by them from Stoutsville to the termination of the line of railway operated by the receivers, and there to be delivered to a connecting carrier, who was to complete the transportation. If this had been done, the bill of lading would have had the plain import which the statute requires; nothing would have been left for construction, and the contract would have conveyed its obvious significance to the shipper who accepted it from the carrier. Because, instead of doing this, the carrier chose, in the body of the bill of lading, to stipulate that they were "to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville Station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois," thus carving out the limitation with respect to carriage, if any, by reference to subsequent conditions, it cannot be reasonably complained that the contract is governed by the statute. The ancillary agreement which was indorsed on the bill of lading, it is to be noted, adds cogency to this view, since it declares that during the whole length of the transit the parties who were to be in charge of the cattle should be deemed employés of the receivers of the Missouri, Kansas and Texas Railway, the initial carrier, and that they should have no right to recover in the event of an injury or damage sustained for which the receivers would not be liable to their regular employés.

Syllabus.

To assert that because there is a liability arising from the application of the statute to the bill of lading which would not result from the bill of lading itself, therefore the statute must necessarily have been held to impose on the carrier a liability for an interstate shipment beyond its own line, is without merit. True, if there had been no statute regulating the form of the bill of lading, and we were called upon to construe the instrument, we might consider that the limitations referred to in the contract restricted the liability of the carrier to his own line. This result, however, is rendered impossible in view of the statute, not because from its provisions a liability is imposed, but because of the failure of the contract to conform to the requisites of the statute. Such was the exact condition in the *Patterson case*, *supra*, for it cannot be doubted that if in that case there had been no statute requiring the signature of the shipper to a contract limiting liability, a contract not signed by the shipper containing an exemption would have been efficacious. But, as the statute required the signature, the contract, unsigned by the shipper, was ineffective to relieve the carrier from a liability stipulated against, it is true, but which was inoperative because not expressed in legal form. Such is, in substance, the situation here presented.

Judgment affirmed.

Mr. Justice Harlan dissented.